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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONTINENTAL BANK INTERNATIONAL,

Appellant,

—against—

CITY OF NEW YORK,
DEPARTMENT OF FINANCE,

Appellee,

ON APPEAL FROM THE COURT OF APPEALS FOR THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

EDWARD W. KEANE
Counsel for Appellant
125 Broad Street
New York, New York 10004
(212) 558-4000

WILLARD B. TAYLOR
H. RODGIN COHEN
THEODORE EDELMAN

SULLIVAN & CROMWELL
New York, New York

Of Counsel

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BEST AVAILABLE COPY

Questions Presented

Section 627 of the Edge Act, 12 U.S.C. § 627, provides that an international bank organized under that Act (an "Edge Bank") "shall be subject to tax by the State within which its home office is located." Although Federal Reserve Board regulations have always permitted Edge Banks to operate across state lines—at first through "agencies" and since 1979 through "branches"—Congress has never consented to the taxation of Edge Banks except by their home-office states.

The primary questions in this case are (1) whether the City of New York's Financial Corporation Tax, N.Y.C. Admin. Code §§ R46-37.1 *et seq.*, as applied to an Edge Bank having its home office in Illinois and a branch in New York, conflicts with Section 627 of the Act and (2) whether the tax is repugnant to the Supremacy Clause of the United States Constitution for lack of the requisite consent of Congress.

As the predicate for its decision of the first of these issues, the Court below held that Section 615(b) of the Act prohibits Edge Banks from having branch offices within the United States. That holding raises the further question whether the Federal Reserve Board regulations purporting to authorize such branches are valid.

Statement Pursuant to Rule 28.1

Appellant has moved for an order permitting its Rule 28.1 listing to be filed under seal. Copies of the listing are herewith submitted to the Court for its *in camera* review.

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IN THE

Supreme Court of the United States

October Term, 1986

No. 86-

CONTINENTAL BANK INTERNATIONAL,

Appellant,

—against—

CITY OF NEW YORK, DEPARTMENT OF FINANCE,

Appellee.

Jurisdictional Statement

This is an appeal from a judgment of the Court of Appeals for the State of New York entered February 19, 1987 upholding the validity of the New York City Financial Corporation Tax (N.Y.C. Admin. Code §§ R46-37.1 *et seq.*) against the contention that, as applied to appellant, such tax conflicts both with 12 U.S.C. § 627 and with the Supremacy Clause of the United States Constitution under principles heretofore established by this Court.

Opinions Below

The opinion of the New York Court of Appeals (Appendix A) is reported at 69 N.Y.2d 281 but has not yet appeared in the unofficial reports. The order of the Appellate Division, First Department, confirming appellee's administrative determination without opinion (Appendix B) is reported at 117 A.D.2d 1023 and 499 N.Y.S.2d 298. The Findings of appellee's Formal Referee (Appendix C) are unreported.

Jurisdiction

This is a proceeding challenging, on federal statutory and constitutional grounds, the validity of the City of New York's Financial Corporation Tax as applied to appellant, an international bank chartered under the Edge Act, 12 U.S.C. §§ 611 *et seq.* As stated in its brief in the Court below, appellant's contention is that " . . . the City of New York's Financial Corporation Tax, as applied to an Edge Bank having its home office outside the State of New York, is repugnant both to 12 U.S.C. § 627 and to the United States Constitution under principles authoritatively established by the Supreme Court" (p. 51), referring to *M'Culloch* v. *Maryland,* 4 Wheat. 316 (1819), and its progeny which, as the Court below noted, are "grounded on the Supremacy Clause" [A6]. The Court below rejected both contentions and concluded that "the City's tax must be upheld" [A10].

The judgment appealed from was entered on February 19, 1987, and no rehearing was sought.[1] Appellant's notice of appeal was filed with the clerk of the New York Court of Appeals on May 11, 1987. Appellant invokes this Court's jurisdiction under 28 U.S.C. § 1257(2). *See Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282 (1921); *Western Air Lines, Inc.* v. *Board of Equalization,* 107 S.Ct. 1038 (1987); *Hobbie* v. *Unemployment Appeals*

[1] Appellant did, however, make a timely motion to amend the remittitur so as to state explicitly that the Court had considered and upheld the validity of the Financial Corporation Tax against the contention that, as applied to appellant, it is repugnant to both Section 627 and the Supremacy Clause. In its motion papers, appellant stated its belief that such was the intended meaning of the Court's opinion, and in opposing the motion appellee did not controvert that interpretation except to quibble over appellant's proposed reference to the Supremacy Clause. On May 7, 1987 the Court below denied the motion without explanation.

Comm'n, 107 S.Ct. 1046, 1048 n.5 (1987) (appeal lies under 28 U.S.C. § 1257(2) even if state court has not been explicit in its rejection of the federal constitutional claim raised by appellant).

Since 28 U.S.C. § 2403(b) may be applicable, a copy of this Jurisdictional Statement is being served on the Attorney General of the State of New York pursuant to Rule 28.4(c) of the Rules of this Court.

Constitutional Provision, Statutes and Regulations Involved

Section 627 of the Edge Act, 12 U.S.C. § 627, provides as follows:

> "Any corporation organized under the provisions of this subchapter [12 U.S.C. §§ 611 *et seq.*] shall be subject to tax by the State within which its home office is located in the same manner and to the same extent as other corporations organized under the laws of that State which are transacting a similar character of business. The shares of stock in such corporation shall also be subject to tax as the personal property of the owners or holders thereof in the same manner and to the same extent as the shares of stock in similar State corporations."

Additional constitutional, statutory and regulatory provisions relevant to this appeal are set forth in Appendix F.

Statement

The Edge Act, a 1919 amendment to the Federal Reserve Act, provides for the federal incorporation of specialized banks empowered to engage in international and foreign banking and financial operations under the supervision of

what is now the Board of Governors of the Federal Reserve System (the "FRB" or "Board"). Edge Banks are authorized to provide a broad range of banking services, including the receiving of deposits and the making of loans, 12 U.S.C. § 615(a) [F3-F5], although their operations within the United States are limited to those that the FRB deems "incidental" to their international and foreign business, *id.* § 616 [F6-F7]. The Edge Act's congressional supporters characterized it as "a new national banking act for banks specializing in foreign trade." 58 Cong. Rec. 7855 (1919).

In Section 627 of the Act, Congress addressed the subject of state and local taxation of Edge Banks and their shares. Like previous statutes governing state and local taxation of federally chartered banks,[2] Section 627 is rooted in the long-standing constitutional principle that the states have no power to tax banks created under the authority of the United States, or the shares of such banks, without the express permission of Congress. *E.g., Owensboro Nat'l Bank* v. *Owensboro,* 173 U.S. 664, 668 (1899). Section 627 permits an Edge Bank to be taxed "by the State within which its home office is located," and further permits the *shares* of an Edge Bank to be taxed "as the personal property of the owners or holders thereof" without reference to the bank's home-office state or other geographic limitation. Except as provided in Section 627, Congress has never permitted the states to tax either Edge Banks or their shares.

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[2] *E.g.,* R.S. § 5219 (national banks); Act of Dec. 23, 1913, ch. 6, § 7, 38 Stat. 258 (federal reserve banks); Act of July 17, 1916, ch. 245, Title I, § 26, 39 Stat. 380 (federal land banks and associations and joint-stock land banks). Similar statutes enacted after 1919 include Act of July 22, 1932, ch. 522, § 13, 47 Stat. 735 (federal home loan banks); Act of June 13, 1933, ch. 64, § 5, 48 Stat. 132 (federal savings and loan associations); and Act of June 26, 1934, ch. 750, Title I, § 18, 48 Stat. 1222 (federal credit unions).

Section 613 of the Act requires every Edge Bank to designate in its organization certificate "the place in the United States where its home office is to be located" as well as "the place or places where its operations are to be carried on" [F3]. Although Section 615(b) permits an Edge Bank to have "branches or agencies" abroad with FRB approval [F5], the Act contains no express provision either authorizing or prohibiting branches and agencies in the United States. The legislative history, however, shows that, while there was some opposition to domestic branching, the Act's supporters insisted—and no one denied—that Edge Banks would need to maintain domestic agencies if they were to provide proper service to customers not located near a banking center. *E.g.*, 58 Cong. Rec. 7857 (1919).

In March 1920, three months after the Edge Act became law, the FRB promulgated Regulation K to govern the organization and operation of Edge Banks. In its original version, Regulation K prohibited domestic branches but permitted domestic "agencies . . . for specific purposes, but not generally to carry on the business of the Corporation" (Reg. K, §§ VIII, X, March 23, 1920) [F10].[3] Neither Regulation K nor the Act itself imposed any geographic limitation on these agencies, and thus Edge Banks were authorized from the outset to operate across state lines.

In 1979, in response to a congressional mandate to eliminate or modify any regulatory restrictions not required by statute that unnecessarily restrict Edge Banks in competing with foreign-owned banking institutions or that

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[3] For reasons stated below (*post*, p. 13 n.9), the Court of Appeals was clearly in error in inferring from the FRB's 1920 regulations that the Board "apparently interpreted" Section 615(b) "to prohibit domestic branches" [A2-A3].

impede the attainment of the Act's purposes,[4] the FRB undertook a major revision of Regulation K. The revised regulation permitted Edge Banks to establish domestic branches for the first time. Noting that Edge Banks "are not subject to Federal law that limits the power of banks to branch across State lines," the Board said that "the new authority [to branch] makes it more efficient and less costly for Edge Corporations to enter and operate at new locations" (FRB Cir. No. 8590, June 20, 1979).

The FRB's action led not only to the establishment of numerous Edge Bank branches, but to the creation of many new Edge Banks and the rapid growth of existing ones. By September 30, 1986, according to FRB data, there were 83 Edge Banks operating 92 domestic branches and having $16.9 billion in assets.

Not surprisingly, state and local taxing authorities in most of the jurisdictions where Edge Bank operations are concentrated—133 (or 76%) of the 175 Edge Bank offices in the United States are in California, Florida, Illinois, New York and Texas—promptly sought to tax these newly established branches. The vast majority of such branches (88 of the 92 domestic branches in existence on September 30, 1986) belong to Edge Banks having their home offices in other states. Appellee, like the taxing authorities in California, Illinois, Florida, New York State and several other banking-center jurisdictions, took the position that it is entitled to tax such branches notwithstanding Section

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[4] International Banking Act of 1978, Pub. L. No. 95-369, § 3, 92 Stat. 607, 608 (1978). Although the 1978 Act also effected certain amendments to the Edge Act (the only substantive amendments made to date), neither the amendments nor the direction to the FRB to revise its regulations addressed the subject of branching by Edge Banks. Specifically, and significantly, the 1978 Act made no change in Section 615(b) of the Edge Act, which the Court below construed as a prohibition of domestic branching.

627 and notwithstanding the absence of congressional consent to such taxation.[5] Appellant commenced the present litigation in order to challenge that position.

Appellant is an Edge Bank having its home office in Chicago and branches in a number of United States cities, including the City of New York. For the years 1980 (the year of its incorporation) and 1981, appellant filed New York City Financial Corporation Tax returns on which it reported taxable income but stated that no tax was due. After an audit, appellee made an administrative determination that appellant is subject to the City's Financial Corporation Tax and that for the years in question it is liable for $6,075,329.35 in taxes on its "entire net income" attributable to its New York branch.[6] Appellee expressly rejected appellant's contention that, as applied to an Edge Bank having its home office outside New York State, the tax conflicts both with Section 627 of the Edge Act and with the principle, established by this Court under the Supremacy Clause of the United States Constitution, that federally chartered banking institutions are not subject to state and local taxation without the express consent of Congress [C15-C16].

After paying the tax under protest, appellant sought judicial review of this determination, reiterating the contentions it had unsuccessfully advanced in the administrative proceeding. The Appellate Division confirmed appellee's

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[5] *See* Note, *A Constitutional and Statutory Analysis of State Taxation of Edge Act Corporate Branches,* 51 Fordham L. Rev. 991, 998-99 n.35 (1983).

[6] Section R46-37.3(a) of the City's Administrative Code defines "entire net income" as the taxpayer's "entire taxable income" reportable for federal tax purposes, subject to certain adjustments [F9]. For the years 1980 and 1981, the "basic tax" (except for certain thrift institutions) was at the rate of 13.823%. *Id.* § R46-37.5.3(a)(1).

determination without opinion [B1], and the Court of Appeals affirmed, holding that the City's Financial Corporation Tax, as applied to appellant, "must be upheld" [A10].

Without analyzing the language of Section 627, the Court of Appeals asserted that it has "facial ambiguity" and that it contains "no plain . . . prohibition of taxation" [A5]. The Court then disposed of the Section 627 issue with a syllogism: Because "the Edge Act did not authorize branch offices within the United States"—citing Section 615(b)—and because "some" legislators said they opposed branching, "it stands to reason that the authorization of full nondiscriminatory taxation by the home office state . . . was not an expression of immunity for then nonexistent branch offices" [A5]. The Court made no attempt to explain why Congress would specifically authorize taxation by the home-office state if it did not intend such taxation to be exclusive.

Turning to the Supremacy Clause, the Court recognized that "almost from their inception, national banks were considered Federal instrumentalities exempt from tax" [A6], but without attempting to identify any constitutionally significant difference between national banks and Edge Banks, the Court held that Edge Banks are not entitled to the same constitutional protection that national banks and all other federally chartered banks have long been accorded [A9].[7]

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[7] The Court's view of the *constitutional* issue appears to have been influenced by the fact that, since 1976, national banks have been subject to general state and local taxation *by statute*. 12 U.S.C. § 548. The statute in question, however, is entirely consistent with the established constitutional principle that national banks are not subject to state and local taxation except with the consent of Congress; the statute merely provides the requisite congressional consent.

It is significant that when Congress consented to the general taxation of national banks, it did not give equivalent consent to the taxation of Edge Banks but instead left Section 627 of the Edge Act as originally enacted in 1919.

The Questions Are Substantial

The resolution of the questions in this case will directly affect the tax liability of every Edge Bank having a domestic branch outside its home-office state. Since there are 88 such branches belonging to 32 Edge Banks, these questions are of substantial importance not only to the Edge Bank industry, but to the tax authorities in most of the major banking centers.

Of at least equal importance is the question—raised and decided *sua sponte* by the Court below as the predicate for its decision of the Section 627 issue—whether Section 615(b) of the Edge Act prohibits domestic branches. The Court of Appeals' holding that such a prohibition is implicit in Section 615(b) casts doubt on the validity of the FRB regulations that, since 1979, have expressly authorized such branches. If the 92 presently existing domestic branches are unlawful because established in reliance on an invalid FRB regulation, the consequences for the many Edge Banks that maintain such branches, and for their customers, will be serious indeed.

The decision below also calls in question the reach and continuing validity of the constitutional principle, first announced in *M'Culloch* v. *Maryland,* 4 Wheat. 316 (1819), and approved by this Court as recently as *First Agricultural Nat'l Bank* v. *State Tax Comm'n,* 392 U.S. 339, 340 (1968), that "the States are without power, unless authorized by Congress, to tax federally created, or, as they are presently called, national, banks." *Ibid.* The Court below not only declined to follow this principle, but applied its antithesis: "Absent congressional action," it asserted, "a State's power to tax may not be denied . . . ." [A10].

Apart from the practical and doctrinal importance of the issues presented in this case, we submit that the decision below was in error for the following reasons:

1. In considering Section 627 of the Edge Act, the Court below ignored the basic rule that "the starting point for interpreting a statute is the language of the statute itself" and that "absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

The Court below recognized that Section 627 "authorizes nondiscriminatory taxation . . . by the home office State" [A5], but it made no attempt to explain why Congress would expressly authorize taxation by the home-office state if it did not intend that authorization to be exclusive. Indeed, the Court attributed no meaning whatever to the statutory direction that an Edge Bank shall be taxable "by the State within which its home office is located"; in effect, it read the quoted words out of the statute. In so doing, the Court *inter alia* destroyed the careful distinction Congress drew between an Edge Bank as a corporate entity, which only the home-office state is authorized to tax, and an Edge Bank's *shares*, which are taxable without geographic limitation.

2. In asserting that Section 627 contains "no plain . . . prohibition of taxation" [A5], and that "absent congressional action . . . a State's power to tax may not be denied" [A10], the Court below inverted, by a full 180 degrees, the long-established principle that "the States are without power, unless authorized by Congress, to tax federally created . . . banks." *First Agricultural Nat'l Bank* v. *State Tax Comm'n, supra,* 392 U.S. at 340. This principle antedated the Edge Act, *see Owensboro Nat'l Bank* v. *Owensboro,* 173 U.S. 664, 668 (1899), and there can be no doubt that Section 627 was drafted in light of it: The office of Section 627 was to provide, with specified limitations, the authorization without which the states could not tax Edge Banks at all. It follows that when Congress

authorized taxation by the home-office state, it intended that authorization to be exclusive.

For precisely the same reason, this Court repeatedly construed the equivalent provision of the National Bank Act (R.S. § 5219, former 12 U.S.C. § 548) as prohibiting all taxation that it did not specifically authorize. *Owensboro Nat'l Bank* v. *Owensboro, supra; Bank of California* v. *Richardson,* 248 U.S. 476 (1919); *First Agricultural Nat'l Bank* v. *State Tax Comm'n, supra; Diamond Nat'l Corp.* v. *State Board of Equalization,* 425 U.S. 268 (1976). Through successive amendments, R.S. § 5219 was always framed as an authorization of specified forms of state and local taxation rather than as a prohibition. At the time of the *Owensboro* and *Bank of California* decisions, for example, Section 5219 said only this about the taxation of national banks:

> "Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes, to the same extent, according to its value, as other real property is taxed" [F8].

This Court nevertheless held that Section 5219 "furnish[ed] the exclusive rule governing state taxation." *Bank of California* v. *Richardson, supra,* 248 U.S. at 483. As the Court said about a later version of R.S. § 5219, it is "abundantly clear" that the section "marks the outer limit within which States can tax national banks." *First Agricultural Nat'l Bank* v. *State Tax Comm'n, supra,* 392 U.S. at 345.

Because the National Bank Act is *in pari materia* with the Edge Act, *Apfel* v. *Mellon,* 33 F.2d 805, 807 (D.C. Cir.), *cert. denied,* 280 U.S. 585 (1929), because Section 627 is to Edge Banks what R.S. § 5219 was to national banks, and because (as shown below) Congress drafted Section

627 with specific advertence to R.S. § 5219 as interpreted by this Court, it is evident that Congress intended Section 627 to be construed in the same way that this Court had construed R.S. § 5219—as "the exclusive rule governing state taxation." *Bank of California* v. *Richardson, supra,* 248 U.S. at 483. Indeed, unless Section 627 constitutes an "exclusive rule," it has no ascertainable meaning whatever.[8]

3. The Court below rejected appellant's reliance on Section 627 because, "inasmuch as the statutory scheme of the Edge Act did not authorize branch offices within the United States (*see* 12 U.S.C. § 615[b]) and the possibility of such offices was decried by some of the original enactors (58 Cong. Rec. 7856-7857 (1919)), it stands to reason that the authorization of full nondiscriminatory taxation by the home-office state (12 U.S.C. § 627) was not an expression of immunity for then nonexistent branch offices" [A5]. The fallacy of this reasoning is threefold.

First, in authorizing taxation of an Edge Bank by "the State within which its home office is located," Congress clearly contemplated not only that an Edge Bank might have more than one domestic office (otherwise there would be no need to refer to its "home" office) but that it might have offices in more than one state (otherwise there would be no need to refer to its home-office "State").

Second, the Act has never prohibited Edge Banks from having domestic branches. The Court below based its con-

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[8] In its administrative ruling [C14] and in its brief in the Court below, appellee advanced the untenable suggestion that the only purpose of Section 627 is to prohibit tax discrimination. Because Congress would hardly prohibit discrimination by the home-office state while leaving all other states free to discriminate without any statutory restriction whatever, the Court below understandably refused to accept that suggestion. It conspicuously failed, however, to offer any alternative theory as to the meaning of Section 627.

trary conclusion solely on a negative inference tendentiously drawn from Section 615(b), which authorizes branches and agencies abroad but which says nothing about branches and agencies in the United States. The FRB has never drawn any such inference, however, for although Section 615(b) was part of the original Edge Act and has never been amended, the Board has expressly authorized domestic agencies since March 1920 (only three months after the Edge Act became law) and has authorized domestic branches since 1979.[9] For sixty-seven years, therefore, the FRB has authorized Edge Banks to conduct multistate operations notwithstanding Section 615(b). The FRB's interpretation of the statute it is responsible for administering—and that in large measure it drafted [10]—"should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969) (footnote omitted).

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[9] The Court below manifestly erred in asserting that in 1920 the FRB "apparently interpreted" Section 615(b) "to prohibit domestic branches" [A2-A3]. The Board said no such thing, in 1920 or ever. To the contrary, by authorizing domestic agencies at the same time that it prohibited domestic branches, the Board unmistakably evidenced its view that Section 615(b) prohibits neither, for as the section refers to branches and agencies in correlation, it cannot be read as a prohibition of one but not the other.

Moreover, the Board could not have authorized domestic branching in 1979 if it had read Section 615(b) as prohibiting such branching. The 1978 Edge Act amendments (International Banking Act of 1978, Pub. L. No. 95-369, § 3, 92 Stat. 607, 608 (1978)) neither repealed Section 615(b) nor purported to authorize domestic branching by Edge Banks, and we do not read the opinion below as suggesting otherwise.

[10] *Hearing Before the Committee on Banking and Currency of the House of Representatives on S. 2472*, 66th Cong., 1st Sess. 33 (1919) (Statement of Hon. William P.G. Harding, Governor, FRB). The bill as drafted by the FRB contained precisely the same language as now appears in Section 615(b).

Third, the Court's statement that the possibility of domestic branching was "decried" by some legislators [A5] does not support its conclusion that Edge Banks were never intended to operate domestically outside their home-office states. The legislative history leaves no doubt that Congress expressly anticipated that Edge Banks would have offices—agencies if not branches—in a number of different states in order to provide proper service to customers not located near a banking center. For example, the Chairman of the House Banking and Currency Committee, which reported the Edge bill to the House (and which drafted what became Section 627), said to a Representative from Iowa:

> "If the gentleman is going to have people in Iowa properly served by these banks, they would want an agency there.
>
> ". . . If the gentleman does not want his people properly served by a local agency they would have to go to New York every time they did business . . . . These financial institutions either are to have agencies or else his people will have to go to Wall Street every time they do business with them." 58 Cong. Rec. 7857 (1919).

No one took issue with the Chairman's statement that Edge Banks would need domestic agencies if they were to carry out their intended mission, and no one suggested that such agencies would be forbidden by the proposed legislation.

Thus the Court of Appeals' crucial assumption—that Congress expected every Edge Bank to operate strictly within the boundaries of its home-office state so that no question of multistate taxation could ever arise—is contrary not only to the statutory language and the FRB's long-

standing administrative interpretation, but to the legislative history as well.[11]

4. The legislative history also makes clear that Section 627 was patterned on the equivalent provision of the Nationl Bank Act (R.S. § 5219) which, only a few months earlier, this Court had construed as "the exclusive rule governing state taxation" of national banks. *Bank of California* v. *Richardson, supra,* 248 U.S. at 483.

The Edge bill's proponents said that they had drawn extensively on the National Bank Act. *See, e.g.,* 58 Cong. Rec. 7856 (1919) ("We have put in a good many restrictions taken from or suggested by the national bank act, or from the Federal reserve act"). The language of what is now Section 627 originated in the House Banking and Currency Committee, one of whose members explained its meaning in these terms:

> "[H]ere is what the committee did in writing the taxing feature of this bill: The Supreme Court of the United States and the different courts have interpreted this language. It is copied verbatim from the national banking act. In other words, we are going to make these corporations and their stock to be taxed exactly in the same manner as national banks and their stock are taxed. We thought that would save a great deal of controversy." 58 Cong. Rec. 8108 (1919).

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[11] The decision below necessarily rests on the further, unarticulated assumption that no question of taxation can ever arise unless the taxpayer maintains a full-fledged branch in the taxing jurisdiction. That assumption is incorrect. Since long before 1919, it has been well established that (absent statutory and constitutional constraints such as are applicable to Edge Banks) a corporation is subject to taxation by any state in which it does business. *See* the cases collected in E. Isaacs, *An Analysis of Doing Business,* 25 Colum. L. Rev. 1018, 1037-1040 (1925). Doing business through an agency, or an office of any other kind, is clearly sufficient to permit taxation. *See Cheney Bros. Co.* v. *Massachusetts,* 246 U.S. 147 (1918).

While this statement somewhat exaggerates the similarities between the two statutes, it nevertheless provides clear and direct evidence that the authors of Section 627 intended it to be construed in the same way that R.S. § 5219 had only recently been construed in *Bank of California* v. *Richardson* —as the "exclusive rule" governing state taxation of Edge Banks.

The Court below brushed aside all of the extensive congressional references to the National Bank Act with the assertion that they "appear to have arisen from a mistaken notion that national banks were subject to State tax" [A6]. As noted, the language now appearing in Section 627 was drafted by the House Banking and Currency Committee, undoubtedly with the aid of its professional staff. There is no evidence whatever that the members of the Committee and its staff—or indeed, that more than a handful of legislators—labored under "a mistaken notion that national banks were subject to State tax." That there were a few misstatements in the course of the floor debates, all by congressmen having no special responsibility for the taxation provision of the bill, is neither surprising nor meaningful. *See Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 204 n.24 (1976) ("Remarks . . . other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight"); *Albernaz* v. *United States*, 450 U.S. 333, 342 (1981) ("It is not a function of this Court to presume that 'Congress was unaware of what it accomplished,'" quoting *United States R.R. Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980)).

5. Nor is the decision below supported by the Court of Appeals' ambiguous statement that "Congressional debate indicated a purpose to subject Edge Act banks to State taxation" [A5-A6]. If the Court meant merely that Congress

did not intend to immunize Edge Banks from all state and local taxation, the statement is correct—Section 627 expressly authorizes taxation by the home-office state—but question-begging. But if the Court meant that Congress intended Edge Banks to be subject to taxation outside their home-office states, the statement is wholly without support. The Court's only citation [A6] was to a portion of the Senate debate (58 Cong. Rec. 4969 (1919)) concerning a taxation proposal materially different from the provision ultimately enacted. The present Section 627 was drafted by the House Banking Committee only *after* the Senate had passed its version of the Edge bill. The Senate subsequently acquiesced in the House version with a change not here relevant. What various Senators previously said about taxation of Edge Banks, therefore, sheds little if any light on the meaning of Section 627.

6. If Congress had indeed intended Edge Banks to be subject to unrestricted state and local taxation, it surely would have expressed that intention with unmistakable clarity not only in the congressional debates but in the statute itself. In 1919, all federally chartered banks, without exception, were subject to state and local taxation to only a very limited degree. The national banks, the federal reserve banks and the federal land banks, for example, were subject to real-estate taxes but were otherwise wholly tax exempt.[12] For Congress to have subjected Edge Banks to unrestricted state and local taxation would have represented an abrupt and radical change in a long-established congressional policy regarding taxation of federally created banks. There is nothing in the legislative history, let alone

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[12] R.S. § 5219 (national banks); 12 U.S.C. § 531 (federal reserve banks); Act of July 17, 1916, ch. 245, Title I, § 26, 39 Stat. 380 (federal land banks).

in the statute itself, to indicate that Congress intended any such major policy change.[13]

7. For a hundred and sixty-eight years this Court has consistently adhered to the principle, grounded in the Supremacy Clause of the United States Constitution, that federally chartered banks are subject to state and local taxation only to the extent permitted by Congress. *See First Agricultural Nat'l Bank* v. *State Tax Comm'n, supra,* 392 U.S. at 340 (1968). In *Department of Employment* v. *United States,* 385 U.S. 355, 360 (1966), the Court observed that this principle is "beyond dispute."

This principle does not, of course, assure tax immunity for federally chartered banks, but it does assure that they will not be subject to a particular tax until Congress has had an opportunity to consider the effect of that tax and has determined that its imposition will not be detrimental to the paramount federal interest. Because Congress actively legislates in the banking field and maintains standing committees in both Houses to monitor banking affairs and to propose new legislation when needed, *First Agricultural*

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[13] The long-standing legislative policy of immunizing federally chartered banks from most state and local taxes reflected a number of complex and interrelated considerations. *See generally* Senate Comm. on Banking, Housing and Urban Affairs, *Board of Governors of the Federal Reserve System Report on State and Local Taxation of Banks,* 92d Cong., 2d Sess. (Comm. Print 1972). In the case of an Edge Bank, several considerations militate in favor of designating a single state as the exclusive taxing authority, including simplicity, ease of administration and minimization of compliance costs. *Id.* at 48, 61. Uncertainties about potential tax liabilities and concern about compliance burdens could exert an undesirable influence over an Edge Bank's business decisions, including its decision whether to transfer certain of its operations abroad. Congress may also have considered some limitations on Edge Banks' tax liability as necessary to foster their growth and to enhance their competitive position in international banking and finance.

Nat'l Bank, supra, 392 U.S. at 341, the application of this principle can hardly be deemed an undue burden on state and local governments, as is demonstrated by Congress' repeated enlargement, over the past sixty-five years, of the states' power to tax national banks (but, significantly, not their power to tax Edge Banks).

This Court has never suggested that this principle applies exclusively to banks organized under the National Bank Act. Indeed, the principle was first established nearly fifty years before there was a National Bank Act, *M'Culloch* v. *Maryland,* 4 Wheat. 316 (1819), and it has survived fundamental changes in both the National Bank Act and the nature and functions of the national banks themselves. This Court has recognized the applicability of this principle to other types of federally chartered banks. *Smith* v. *Kansas City Title & Trust Co.,* 255 U.S. 180, 212 (1921) (federal land banks and joint-stock and land banks). This Court has never held, or even intimated, that the states are empowered to tax *any* type of federally chartered bank except with the express permission of Congress.

The Court below acknowledged that Congress has never consented to the taxation of Edge Banks except by their home-office states [A5], but it held that such congressional consent is unnecessary. "Absent congressional action," the Court said, "a State's power to tax may not be denied" [A10]. The Court thus turned the long-established principle on its head.

Without making any attempt to identify constitutionally significant differences between Edge Banks and national banks, the Court below accorded them a wholly different constitutional status. There is no rational basis for distinguishing Edge Banks and national banks for constitutional purposes. As noted, Congress conceived of the Edge Act as "a new national banking act for banks specializing

in foreign trade," 58 Cong. Rec. 7855 (1919), and many of the provisions of the Edge Act were "taken from or suggested by the national bank act," *id.* at 7856. Like national banks, Edge Banks are empowered to provide a broad range of banking services, including such quintessential banking services as receiving deposits and making loans. The most important difference between the two is that national banks, like state-chartered banks, are empowered to engage in general domestic banking, whereas the domestic operations of Edge Banks must have a nexus with their international and foreign operations. Thus Edge Banks, unlike national banks, operate entirely within a sphere in which the federal interest is predominant if not exclusive. It would be anomalous to accord a lesser degree of constitutional protection to Edge Banks, which were created to further foreign trade and other specifically federal interests, than to national banks, whose business may be distinctly local in nature.

The Court below declined to follow the well-developed body of law dealing with the tax status of federally chartered banks, and instead relied on cases involving federal licensees, federal contractors and the Red Cross [A7-A9]. In so doing, the Court ignored the "unique" and "distinctive" characteristics of commercial banks and the fact that such banks play a "key role in the national economy" and are "critical to the Nation's welfare." *United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 326, 372 (1963). Whatever the present status of the "federal instrumentality" doctrine in other contexts, there remains ample justification for the long-standing rule that banks operating under federal authority shall be subject to state and local taxation only after Congress has had an opportunity to evaluate the consequences of such taxation and has given its affirmative consent. The Court of Appeals' refusal to apply that rule to Edge Banks was arbitrary and unsupportable.

Conclusion

We submit that in upholding the validity of the New York City Financial Corporation Tax, the Court below misconstrued Section 627 of the Edge Act, unjustifiably departed from this Court's decisions permitting state and local taxation of federally chartered banks only with the express consent of Congress, and erroneously held that Section 615(b) of the Edge Act prohibits domestic branching notwithstanding FRB regulations expressly permitting such branching. The questions presented by this appeal are both substantial and of public importance.

Respectfully submitted,

EDWARD W. KEANE
Counsel for Appellant
125 Broad Street
New York, New York 10004
(212) 558-4000

WILLARD B. TAYLOR
H. RODGIN COHEN
THEODORE EDELMAN

SULLIVAN & CROMWELL
New York, New York

Of Counsel

May 20, 1987

APPENDIX A

Opinion of the New York Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

In the Matter of
CONTINENTAL BANK INTERNATIONAL,

Appellant,

v.

CITY OF NEW YORK, DEPARTMENT OF FINANCE,

Respondent.

Edward W. Keane, Willard B. Taylor, H. Rodgin Cohen, & Theodore Edelman, NY City, for appellant.

Frederick A.O. Schwarz, Jr., NYC Corporation Counsel (Joseph V. Hamilton, Edith I. Spivack, Gale Zarecko, & James F. Eller of counsel) for respondent.

Jo-Ann Horn, Los Angeles, Security Pacific Intnl Bank; Richard C. Pugh, NYC, PNC Intnl Bank; Michael G. DeAngelis, San Francisco, Bank America Intnl. amici curiae.

OPINION

TITONE, J.:

The question before us is whether an international bank chartered by the Federal Government pursuant to the Edge

Act (12 USC §§ 611-632)[1], having a home office in another state and a branch office in New York City is immune from New York taxation. Inasmuch as we conclude that Edge Act banks are not Federal instrumentalities entitled to constitutional immunity from State tax and Congress has not clearly prohibited such a tax, we hold that Edge Act bank branches are not immune from nondiscriminatory State taxation.

I.

In 1919, Congress authorized the incorporation of international banks to be chartered by the Federal Government (12 USC §§ 611-632, [Edge Act]) in response to a perceived need to supply international credit and to secure foreign trade markets for domestic exports (Note, *Constitutional and Statutory Analysis of State Taxation of Edge Act Corporate Branches,* 51 Fordham L Rev 991, 995). Edge Act banks were to provide general banking services for international transactions, establish overseas branches, receive deposits in the United States only when incidental to international business transactions and invest in the stock of certain other corporations engaging in business abroad (12 USC § 615).

The Federal Reserve Board, the regulating authority, apparently interpreted the authorization of Edge Act bank branches and agencies in "foreign countries, their dependencies or colonies, and in the dependencies or insular possessions of the United States, at such places as may be

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[1] Edge Act (§§ 611-632) banks were authorized by Congress to provide general banking services for international transactions. A fuller discussion of the nature of these banks begins in section I, *infra*.

approved by the Federal Reserve Board" (12 USC § 615 [b] to prohibit domestic branches. Thus, in 1920, the Board promulgated a regulation prohibiting them (reg K at 12 CFR 211.6[a][1978]). As a result of this regulatory posture, petitioner's parent corporation, Continental Illinois National Bank and Trust Company, owned three separately incorporated Edge Act banks with home offices in New York, Miami and Houston.

Through the International Banking Act of 1978, Congress amended the Edge Act in a general attempt to expand the powers of Edge Act banks to mobilize and apply resources to aid in an increase of American trade. The act also contained a specific instruction to the Federal Reserve Board to "review and revise its rules, regulations, and interpretations . . . to eliminate or modify any restrictions, conditions, or limitations" which inhibited the bank's competitive position in international finance (92 US Stat 608). In response to this general mandate, the Board revised Regulation K (12 CFR 211.4[c], 44 Fed Reg 36007 [1979]) to allow Edge Act banks to establish branch offices within the United States.

Petitioner is a corporation which was organized under the Edge Act in 1980, with its home office in Chicago, Illinois. In 1980, petitioner established its New York City branch office and, since then, petitioner has established branch offices in a number of large cities throughout the United States. When petitioner was incorporated, the parent's separately incorporated Edge Act banks were liquidated and replaced by branch offices of petitioner.

While the Edge Act banks were separately incorporated in each State, the banks did not dispute the right of the City of New York to tax the corporations. Section 627 of the Edge Act clearly authorizes such State taxation of an Edge

Act bank by the State in which its home office is located.[2] Upon the advent of the Edge Act bank domestic branch office, however, petitioner challenged the City's power to tax branch offices and refused to pay respondent's Financial Corporation Tax.[3] Respondent determined that petitioner owed deficiencies, penalties and interest, for the periods of September 1, 1980 to December 31, 1980 and January 1, 1981 to December 31, 1981, in the total amount of $6,075,329.35.

Petitioner commenced this proceeding pursuant to CPLR article 78 challenging respondent's ability to tax a branch office of an Edge Act bank. The proceeding was transferred to the Appellate Division, First Department, by the Supreme Court, New York County (CPLR 7804[g]). The Appellate Division confirmed the determination, without opinion. Petitioner then appealed to this court on constitutional grounds (CPLR 5601[b][1]). We now affirm.

II.

Petitioner urges that 12 USC § 627 reflects a Congressional intent to prohibit taxation of these new branch

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[2] Section 627 provides: "Any corporation organized under the provisions of sections 611-631 of this title shall be subject to tax by the State within which its home office is located in the same manner and to the same extent as other corporations organized under the laws of that State which are transacting a similar character of business. The shares of stock in such corporation shall also be subject to tax as the personal property of the owners or holders thereof in the same manner and to the same extent as the shares of stock in similar State corporations.

[3] The City of New York imposes a financial corporation tax in the following terms: "For the privilege of doing business in the city in a corporate or organized capacity, a tax, computed under section R46-37.5, is hereby annually imposed on every banking corporation for each of its taxable years, or any part thereof" (Administrative Code of the City of New York § R46-37.1[a]).

offices of Edge Act banks. Alternatively, petitioner argues that the Edge Act banks are Federal instrumentalities like national banks, and, therefore, are not subject to State taxation absent express Congressional authorization. For the following reasons, neither of these contentions is meritorious.

A.

It is beyond dispute that Congress has the power to grant or withhold immunity from tax it deems necessary to further the purposes of Federal legislation (*Washington* v. *United States,* 460 US 536, 546; *United States* v. *New Mexico,* 455 US 720, 737; *Carson* v. *Roane-Anderson Co.,* 342 US 232, 234; Tribe, American Constitutional Law, § 6-28, at 391; 1 Rotunda, Nowak, Young, Constitutional Law, § 3.3, at 211). Although 12 USC § 627 authorizes nondiscriminatory taxation of Edge Act banks by the home office State, there is no plain authorization or prohibition of taxation by States of branch offices. Petitioner asks us to conclude that this omission was an expression of Congresional intent to prohibit taxation of the branches. We reject this argument and, instead, examine the historical setting of section 627 to determine Congress' intent in view of the statute's facial ambiguity with respect to State taxation of branch offices.

Inasmuch as the statutory scheme of the Edge Act did not authorize branch offices within the United States (*see,* 12 USC § 615[b]) and the possibility of such offices was decried by some of the original enactors (58 Cong Rec 7856-7857), it stands to reason that the authorization of full nondiscriminatory taxation by the home office State (12 USC § 627) was not an expression of immunity for then nonexistent branch offices. Instead, Congressional

debate indicated a purpose to subject Edge Act banks to State taxation (58 Cong Rec 4969). It is true, as petitioner notes, that some of the debators analogized to the treatment of national banks, but their comments, read in context, appear to have arisen from a mistaken notion that national banks were subject to State tax (*see, e.g.*, 58 Cong Rec 4969, 8108; Note, *Constitutional and Statutory Analysis of State Taxation of Edge Act Corporate Branches*, 51 Fordham L Rev 991, 1002-1003). Moreover, Congress' failure to amend 12 USC § 627 to expressly permit States to tax Edge Act bank branch offices after the act was amended by the International Banking Act of 1978 is not instructive. Since the enactment permitted the Federal Reserve Board to design a mechanism to accomplish this and it was not until 1979 that the Federal Reserve Board amended Regulation K allowing branch offices, Congress' inaction in 1978 cannot be interpreted as an expression of immunization of branches from State taxation. In short, an intention of Congress to deny the State's power to tax Edge Act bank branches cannot be inferred from the language of the statute, which is at best ambiguous on that subject, or from the surrounding debates which indicate only an intent to subject Edge Act banks to State taxation.

B.

The remaining question is whether Edge Act banks are Federal instrumentalities because of their similarity to national banks and, thus, immune from State taxation. Almost from their inception, national banks were considered Federal instrumentalities exempt from tax (*M'Culloch* v. *Maryland*, 4 Wheat [17 US] 316). The dispute spawning the *M'Culloch* doctrine, grounded on the supremacy clause (US Const, art VI, cl 2), involved a Maryland tax imposed

upon banks not chartered by the State's Legislature which placed the Second Bank of the United States in an inferior position to State banks. Noting that "the power to tax involves the power to destroy" (*id.*, p 431), Chief Justice Marshall, writing for a unanimous Court, concluded that States did not have the power to tax the Federal Government or its instrumentalities to the limits of the States' discretion. After *M'Culloch,* national banks survived numerous attacks on their State tax-exempt status (*see, e.g., Owensboro Natl. Bank* v. *Owensboro,* 173 US 664).

When the Federal Reserve Board took over many of the governmental functions of the national banks, once again, the banks' tax-exempt status was questioned (*Agricultural Bank* v. *Tax Commn.*, 392 US 339). The Court specifically declined to reach, as unnecessary, the issue whether today national banks should be considered nontaxable as Federal instrumentalities, because of pertinent legislation in the banking field (*id.*, p 341). Thus, the recent tax-exempt status of national banks rested on a decision by Congress that they should not be taxed by the States. Moreover, effective in 1976, Congress removed this exemption (12 USC § 548). The argument that Edge Act banks are Federal instrumentalities because they are analogous to national banks, is, therefore, problematic.

While Congress may expressly designate an entity exempt from tax (*see, Agricultural Bank* v. *Tax Commn.*, 392 US 339, 341, *supra; Graves* v. *New York ex rel. O'Keefe,* 306 US 466, 476), a Court may also conclude that a body is a Federal instrumentality constitutionally immune from State taxation. The Supreme Court has recently expressed that tax immunity is appropriate only in the narrow instance "when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the

Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned" (*United States* v. *New Mexico*, 455 US 720, 735, *supra*). In *Department of Employment* v. *United States* (385 US 355), the Court concluded that the Red Cross was such an instrumentality and not subject to State tax. While the Court then stated that here was no precise test for a Federal instrumentality, the decisive features noted were that Congress chartered the Red Cross subject to governmental supervision and regular audit, that the principal officer and 7 of 49 governors were appointed by the President and that the organization was indispensable to the workings of the Armed Forces, the provision of disaster relief from the Federal Government to the States and the performance of the nation's commitments pursuant to treaties (*id.*, p 359). Of equal importance were the factors that the Red Cross received substantial material assistance from the United States Government and that the President and Congress acted in reliance on the Red Cross' status as an arm of the Government (*id.*, pp 359-360; *see also, Standard Oil Co.* v. *Johnson*, 316 US 481).

In contrast, corporations whose only function was to service governmental atomic research centers for their management, procurement and maintenance needs were held not to be Federal instrumentalities in *United States* v. *New Mexico* (*supra; see also United States* v. *Boyd*, 378 US 39). The essential nature of these functions to the Federal Government is beyond question. However, the Supreme Court specifically stressed that the professional interests of the contractors and the Federal Government were not congruent (455 US, p 740). The contractors profit seeking separated them sufficiently from the Government that State taxation

was considered inoffensive to the notion of Federal supremacy (*id.*, p 741).

To determine whether Edge Act banks are a Federal instrumentality, a virtual arm of the Government, therefore, it is necessary both to weigh those factors found determinative in *Department of Employment* v. *United States* (*supra*, pp 358-359) and to consider, generally, whether those factors demonstrate that the banks are so closely connected with the Government that they cannot realistically be viewed as separate entities (*United States* v. *New Mexico*, 455 US 720, 735, *supra*). While it is true that Edge Act banks are chartered by the Federal Government and subject to strict Federal regulation, those characteristics alone are not enough to lead to a conclusion that they should be immune from tax (*see, Broad Riv. Power Co.* v. *Query*, 288 US 178; *Railroad Co.* v. *Peniston*, 18 Wall [85 US] 5). There is a difference between the strong Federal hand in the internal leadership structure of the Red Cross (*Department of Employment* v. *United States, supra*) and mere regulatory supervision common to industries from broadcasting to drug manufacturing. Edge Act banks receive no financial assistance from the Federal Government (*id.*, p 359). The Federal Government does not rely on Edge Act banks to perform a traditionally governmental act (*id.*, pp 359-360). Rather, the Government relies upon the banks' separate profit motivation which propels the banks toward a mutually satisfactory end. It is this parting of the purpose (*United States* v. *New Mexico, supra*) and the lack of nearly all of the traits found determinative in *Department of Employment* v. *United States (supra)* that lead us to conclude that Edge Act banks are not Federal instrumentalities entitled to constitutional immunity from tax.

III.

Absent congressional action or the clearest constitutional mandate, a State's power to tax may not be denied (*United States* v. *New Mexico,* 455 US 720, 738, *supra,* quoting *Michelin Tire Corp.* v. *Wages,* 423 US 276, 293). In the absence of both or any evidence that the city's taxation scheme is discriminatory (*see, Washington* v. *United States,* 460 US 536, 542; *Memphis Bank & Trust Co.* v. *Garner,* 459 US 392, 397), the city's tax must be upheld.

Accordingly, the judgment of the Appellate Division should be affirmed, with costs.

* * * * *

Judgment affirmed, with costs. Opinion by Judge Titone. Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Hancock Jr., and Bellacosa concur.

Decided February 19, 1987

APPENDIX B

Order of the Appellate Division

25903

In the Matter of the Application of
CONTINENTAL BANK INTERNATIONAL,

Petitioner,

—against—

CITY OF NEW YORK, DEPARTMENT OF FINANCE,

Respondent.

Pursuant to Article 78 of the CPLR.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 20, 1986.

Present—

HON. FRANCIS T. MURPHY, Presiding Justice.
THEODORE R. KUPFERMAN
DAVID ROSS
E. LEO MILONAS
BETTY WEINBERG ELLERIN,

Justices.

The above-named petitioner having moved at Special Term of the Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Law and Rules, for a review by the court of a determination of the respondent dated March 15, 1984,

And this proceeding having been transferred by order of said court, entered on October 25, 1984 (Richard Wallach, J.), to this Court for review and determination,

Order of the Appellate Division

And said proceeding having been argued by George J. Marchese of counsel for petitioner, by Joseph V. Hamilton, Jr. of counsel for respondent, and a brief having been submitted by Security Pacific International Bank, PNC International Bank and BankAmerica International by Richard C. Pugh of counsel, as amici curiae; and due deliberation having been had thereon,

It is unanimously ordered that the determination of the respondent be and the same hereby is confirmed. Respondent shall recover of petitioner $75 costs and disbursements of this proceeding. The clerk is directed to enter judgment in favor of respondent, with costs.

ENTER:

HAROLD J. REYNOLDS
Clerk.

APPENDIX C

Findings of the City of New York, Department of Finance

CONTINENTAL BANK INTERNATIONAL
231 South LaSalle Street
Chicago, Illinois 60693

FINDINGS

Gennaro G. Columbus
Formal Referee
March 2, 1984

Audit Nos.: SFTX-26
LFTX-54FTX

E.I.N.: 36-3084835

Appearances:

For the City of New York—Department of Finance:

Jonathan Robin, Esq.
Departmental Counsel

For the Taxpayer:
John A. Garraty, Jr. and
John M. Callagy, Esqs.
c/o Kelly Drye & Warren, Esqs.
101 Park Avenue
New York, New York 10178

Facts, Issues, Conclusions, Decision:

FACTS:

Petitioner (Continental Bank International ("CBI")), filed New York City Financial Corporation Tax returns for the periods 9/1/80 to 12/31/80 and 1/1/81 to 12/31/81, indicating no taxes due. The Department of

Finance, upon audit, determined a tax deficiency for both periods. The deficiency determined for the period 9/1/80 to 12/31/80 a tax principal of $1,040,475.32. The deficiency determined for the period 1/1/81 to 12/31/81 a tax principal of $3,779,393.98.

The taxpayer filed timely petitions for hearing requesting a redetermination of tax for both periods. The petition for the earlier period was received by the Department of Finance December 7, 1982, while the petition for the latter period was received on January 3, 1983. A formal hearing to review such Notices of Determination was commenced on June 9, 1983.

The Petitioner is a corporation organized under section 25-A of the Federal Reserve Act, which has been codified at 12 U.S.C. Sec. 611-631 (the "Edge Act"). It is a wholly owned subsidiary of Continental Illinois National Bank and Trust Company. It received a permit to begin business dated August 21, 1980 from the Board of Governors of the Federal Reserve System. The Petitioner's "Articles of Association" indicate that its home office is to be located in Chicago, Illinois. Petitioners acknowledge that for the periods in question it was doing a banking business in New York City and that it maintained a branch office within New York City. (R., Pgs. 79, 80).

According to the testimony of Philip DeChiara, a vice-president of the Petitioner, Continental Bank International established the branch in New York City, as well as branches in Los Angeles, California, Miami, Florida and Houston, Texas in 1980, followed, in 1981, by the opening of additional branches in Seattle, Washington, Minneapolis, Minnesotta, Cleveland, Ohio, Philadelphia, Pennsylvania, San Francisco, California and Dallas, Texas. (R., Pg. 62). Prior to the incorporation of the Petitioner, its parent bank

owned three separately incorporated Edge Act Corporations with home offices in New York, Miami and Houston, respectively. Following the Petitioner's incorporation, Mr. DeChiara stated that the separately incorporated Edge Act Corporations owned by the parent bank were liquidated and dissolved as part of a reorganization of the parent's Edge Act activities. DeChiara testified that this reorganization was undertaken to obtain the benefits of changes made to Federal Reserve Board Regulation K in 1979 which permitted Edge Act Corporations to branch across state lines. (R., Pgs. 60, 61).

Issue Presented:

Is an Edge Act Corporation with its home office outside New York State subject to the New York City Financial Corporation Tax when it maintains a branch and is doing business in New York City?

STATUTES INVOLVED

NEW YORK CITY

Section R46-37.1 of the Administrative Code of the City of New York which imposes the Financial Corporation Tax, reads in pertinent part, as follows:

> "For the privilege of doing business in the city in a corporate or organized capacity, a tax, computed under section R46-37.5, is hereby annually imposed on every banking corporation for each of its taxable years, or any part thereof, beginning on or after January first, nineteen hundred seventy-three."

Section R46-37.2, subdivision (a), so far as is pertinent, defines "Banking Corporation" to include:

> "every other corporation or association organized under the authority of the United States which is doing a banking business in the city"

Section R46-37.2, subdivision (b), defines the words "Banking Business" as follows:

> "The words 'banking business' as used in this section means such business as a corporation or association may be created to do under articles three, five, five-a, six, seven and ten of the banking law or any business which a corporation or association is authorized by such articles to do. However, with respect to a national banking association organized under the authority of the United States, a federal savings and loan association or a production credit association, the words 'banking business' as used in this section means such business as a national banking association, federal savings and loan association or production credit association, respectively, may be created to do or is authorized to do under the laws of the United States or this state."

FEDERAL

The Edge Act permits the formation of Federally-chartered corporations to provide banking services for international transactions. They can receive deposits in the United States related to foreign transactions, finance domestic production of goods and services for export, and invest in foreign banking and financial corporations. (12 U.S.C. Sec. 615).

Section 627 of the Edge Act provides as follows:

> "Any corporation organized under the provisions of Sections 611-631 of this title [i.e., the Edge Act

> provisions] shall be subject to tax by the State within which its home office is located in the same manner and to the same extent as other corporations organized under the laws of that State which are transacting a similar character of business. The shares of stock in such corporations shall also be subject to tax as the personal property of the owner or holder thereof in the same manner and to the same extent as the shares of stock in similar state corporations."

Regulation K is the Federal Reserve Board regulation which sets forth the rules governing the formation and conduct of Edge corporations. It was originally issued in 1920, one year after the Edge Act was enacted by Congress. The regulation did not permit Edge Corporations to open branches in the United States. Therefore, in order for a parent bank to have Edge Bank offices in several states, each office had to be separately incorporated in a home state and each corporation was subject to a minimum capitalization requirement of $2 million dollars. In 1978, the International Banking Act was passed, to improve the ability of United States banks to compete effectively in the field of international banking and finance. It directed the Federal Reserve Board to expand the powers and improve the competitive position of Edge Act corporations. Accordingly, the Board made numerous revisions to Regulation K in 1979, including enabling Edge corporations to establish branches across state lines. (12 C.F.R. Sec. 211.4 (c) (1980).

LEGAL ANALYSIS

In claiming exemption, the taxpayer contends that New York City is prohibited from imposing the Financial Cor-

poration Tax on the income of CBI's New York branch, or on the New York City branch office of any Edge Act bank having its home office outside New York State. The taxpayer contends this conclusion is required because, (1) under constitutional principles, states and municipalities may not tax federally chartered banks unless they have been specifically authorized to do so by Congress and, (2) the plain language and legislative history of Section 627 indicate that Congress has not authorized states other than the home state to tax Edge Act banks, but instead has prohibited such taxation, and (3) existing authorities interpreting Section 627 confirm the conclusion that states other than the home office state may not tax Edge Act banks.

1. *Federal Instrumentation Issue*

The taxpayer cites no Edge Act case that reached the Supreme Court to support its position. Instead, the taxpayer categorizes Edge Act banks as federal instrumentalities so as to incorporate itself with the holdings of *McCulloch* v. *Maryland,* 17 U.S. 159, 4 L. Ed. 579 (1819).

In *McCulloch* v. *Maryland,* Chief Justice John Marshall, writing for a unanimous Supreme Court, stated that it is unconstitutional under Article VI, Clause 2, of the Constitution of the United States (the "Supremacy Clause") for a state to impose a tax on the operations of an instrument lawfully employed by the United States Government to carry its powers into execution. The federal "instrument" in that case was the Second Bank of the United States, a federally chartered *national* bank, and the tax found unconstitutional in its application to this bank was a Maryland tax imposed upon banks not chartered by the state's legislature.

Findings of the City of New York, Department of Finance

The legal principle that has evolved from this landmark case is that *instrumentalities* of the Federal Government, in the absence of express Congressional consent, cannot be subject to state and local taxation. *United States* v. *County of Allegheny,* 322 U.S. 174, 177 (1943).

While the Supreme Court has ruled that national banks are tax-immune instrumentalities, *Agricultural National Bank* v. *Tax Commission,* 392 U.S. 339 (1968), it has never ruled on this issue with regard to "Edge Act" banks. And the fact that they are federally chartered (12 U.S.C. Secs. 611-631) should not be determinative for tax immunity purposes because there are numerous federally chartered organizations that are not instrumentalities of the Government and that are subject to state and local taxation in many jurisdictions and for varied types of taxes, without limitations or immunities. *Railroad Co.* v. *Peniston,* 85 U.S. 5, 21 L. Ed. 792 (1873); *Broad River Power Co.* v. *Query,* 288 U.S. 178.

Applying the test for ascertaining whether an institution is so closely related to governmental activity as to ascribe to it the status of a tax-immune instrumentality is difficult. Various formulations of the controlling test have been applied, e.g.:

(1) whether it has been so incorporated into the governmental structure as to become an instrumentality of the United States. *United States* v. *Boyd,* 378 U.S. 39, 48: 12 L. Ed. 2d 713 (1964);

(2) whether it is an arm of the Government deemed by it to be essential for the performance of governmental functions and serving as an integral part of a department of government in the fulfillment of duties entrusted to it. *Standard Oil Co.*

v. *Johnson,* 316 U.S. 481, 485, 86 L. Ed. 1611, 1615 (1942);

(3) whether it has been so assimilated by the Government as to become one of its constituent parts; *United States* v. *Township of Muskegon,* 355 U.S. 484, 2 L. Ed. 2d 436, 438 (1958);

Under these general holdings, the Court has looked to various specific factors and characteristics to determine the status of the specific institution, i.e., whether it is organized for private gain; whether the Government retained such control over it that it could properly be called a servant of the United States in agency terms; whether its organization was to effectuate a specific governmental program, *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.,* 314 U.S. 95, 102, 86 L. Ed. 65 (1941); whether its ownership, substantially or totally, lies in the Government, *Clallem County* v. *U.S.,* 263 U.S. 341, 343, 68 L. Ed. 328, 330 (1923); *Railroad Co.* v. *Peniston,* at 32 supra; whether governmental officials handle and control its operations, *Standard Oil Co.* v. *Johnson,* supra; whether its officers or any significant portion of them are appointed by the Government, *Dept. of Employment* v. *U.S.* 385 U.S. 355; whether the government gives it significant financial aid; whether it is charged by law with carrying out some of the Government's international commitments; and whether it performs functions indispensable to the workings of a governmental unit, *Dept. of Employment* v. *U.S.,* supra, at 359, 17 L. Ed. 2d at 418.

With certain exceptions unimportant to the instant case, "Edge Act" banks are privately owned banks whose stock must be owned either by United States citizens or corporations. If owned by a corporation, the controlling interest must be owned by citizens of the United States and it must

be chartered under laws of the United States or law of a State of the United States. (12 U.S.C. Sec. 619).

Theoretically, Edge corporations may be organized by individuals and non-banking institutions; in practice they are owned by other banking institutions (*Travis* v. *National City Bank of New York,* 23 F. Supp. 363 (1938). The common motivation of these privately owned banks is profit making: the sale of banking products and services in connection with international trade transactions. The Federal purpose for their creation and regulation stemmed from the recognition that for international trade, expansion, and a quest for development of new markets for American goods, there was a corresponding need for non-discriminating credit financing for American exports in competitive foreign markets. Hence, Edge banks were created to serve as vehicles through which this end was to be achieved.

In the Senate debate before the Edge Act was enacted, Senator Edge in a speech in support of his bill stated:

> "Our banks at present are not in a position to finance foreign sales, and it is necessary * * * * that we supplement the banking system in this carefully protected manner." 58 Cong Rec. Parts 5 and 8.

Also relevant are excerpts from the House and Senate reports on the International Banking Act of 1978:

> "Subsection (b) amends the Edge Act to include a declaration of congressional policy which is to serve as guidance to future regulatory actions and interpretations by the Board of the Edge Act. The purposes set forth recognize the importance of establishing international banking facilities throughout the country in promoting international trade, espe-

cially U.S. exports; the need to foster Edge Act ownership by regional and smaller banks, in particular, to bring trade financing opportunities to small farms and business; to stimulate export opportunities and competition in international finance, the need to maintain competitive equality between Edge Act corporations and similar foreign-owned banking institutions in the United States and abroad; and the need to interpret the act in the light of changing economic conditions and banking environments, with a requirement that regulations be reviewed at least once every 5 years. *The emphasis is on financing exports; and that is where it should be in order to establish and maintain a sound U.S. trade position.*

Subsection (c) eliminates the requirement that all Edge Act corporation directors be U.S. citizens. This provision, in conjunction with subsection (f), will enable foreign-owned banking institutions to own Edge Act corporations, and in so doing will enable them to penetrate new trade markets in the United States. This should assist in the spread of international banking and finance facilities throughout the country, stimulating competition and new export opportunities.

* * * * *

Subsection (f) would modify the Edge Act to permit foreign-owned banking institutions to acquire majority stock control of such corporations. The present provision prohibiting such majority control dates from an earlier period when the Congress was concerned that U.S. banking organizations lacked the knowledge and wherewithal to compete with the

> great banking and trading houses of Europe. Such fears no longer reflect reality and the present provision serves only to restrict unnecessarily foreign bank entry into new international trade markets within the United States."
>
> (underscores provided: House and Senate Reports for H.R. 10899; 12 U.S.C. Sec. 619, as amended, September 17, 1978).

Given this background, it is incorrect to consider these international business banks as tax-immune instrumentalities of the United States merely because they are federally chartered, when in reality they are doing nothing more than what other State banks are permittted to do domestically.

2. *§ 627 of the Edge Act*

The Taxpayer's contention that the plain language and legislative history of Section 627 of the Edge Act means that Congress has not authorized states other than the home state to tax Edge Act banks is without support and without merit.

When the Edge Act was first enacted there was no provision for domestic branches in the law. Such banks were only authorized to establish branches in foreign countries, dependencies, or insular possessions of the United States for the furtherance of foreign commerce of the United States (12 U.S.C. 601). Hence, the issue of multistate taxation would have been academic in 1919.

When Congress desired to grant a complete exemption from all taxes for the Federal Reserve Banks, it clearly and unequivocally set it forth in no uncertain terms:

> "Federal reserve banks, including the capital stock and surplus therein and the income derived there-

> from, shall be exempt from Federal, State and local taxation, except taxes upon real estate." 12 U.S.C. Section 531.

When Congress enacted Section 41 of the National Banking Act of 1864 dealing with state taxation of national banks, and as this section has been subsequently amended (12 U.S.C. Sec. 548), it set forth specifically the type of taxes which states could impose with specific conditions and limitations prescribed therein.

When Congress enacted Section 627 of the Edge Act in 1919, it clearly intended taxation of Edge corporate income by the state in which the home office of the bank was located, but only on condition that it is taxed in the same manner and to the same extent as other corporations organized under the laws of that state transacting a similar character of business. At the time of this enactment (1919) there were no domestic branches of Edge Act banks authorized by Federal Reserve Board Regulation K, issued in 1920 pursuant to Section 615 of the Edge Act. Instead, branches or agencies of such banks were only permitted to be established on approval of the Board of Governors of the Federal Reserve System in foreign countries, and in dependencies or insular possessions of the United States. Therefore, in order for a bank to establish Edge corporate offices in several states each office was required to be separately incorporated within the state in which the bank sought to operate. It was through this procedure, that states had effective authority to tax an Edge Act bank located and incorported within its jurisdiction.

It was not until sixty years later, and as a result of major revisions of the International Banking Act of 1978 that domestic branches first appeared. The Board of Governors

of the Federal Reserve System, in the exercise of its broad powers pursuant to a general directive of the 1978 enactment, amended Regulation K in 1979 to allow Edge corporations to establish domestic interstate branches on prior approval of the Board of Governors, (12 C.F.R. Sec. 211.4(c), 1982, amending 12 C.F.R. Sec. 211.6(a), 1978).

Under the amended Regulation Section 211.4(a) in granting its approval for establishment of a domestic branch, the Board will consider the same factors as it does in reviewing a request for an Edge corporate charter, namely: the financial condition of the applicant, the character of its management, the need for the services and the effects of competition.

Such domestic branches, having been authorized by the Board of Governors without explicit delegation in the Congressional enactment, may be susceptible to constitutional attack on this account. Nonetheless, Edge corporations have expanded, the federal policy objective of promoting foreign trade has been furthered, and Congress has taken no affirmative step to modify the original language of Section 627 of the Edge Act with respect to any further pronouncements as to the tax status of Edge branches in states other than the home state. And there have not been any affirmative measures to repeal Section 627. Therefore, since domestic branches were not in existence when Section 627 was enacted, there could have been no legislative intent to exempt such branches and none should be implied nor read into a statute by implication in the absence of a clear and positive expression (McKinney's Statutes, Sec. 294). Moreover, where possible, tax statutes are to be construed to insure collection of all taxes (McKinney's Statutes, Sec. 313 (b)).

Moreover, even if Edge Act banks had been authorized by the original enactment to establish interstate domestic

branches, a literal reading of Section 627 would lead to the conclusion that the home state of an Edge bank can impose any tax upon such bank, provided there is a similar tax which it imposes to the same extent upon other corporations organized under the laws of such state which transact a similar business within such state. There is no mention of any state tax exemption for any Edge Act banking activities either within or without the home state. The only concern was that where a federally chartered Edge Act bank does business, under the long established dual banking system, there be no discriminatory tax scheme which would arbitrarily disfavor and impose a greater tax burden upon federally chartered banks. Under these circumstances, the words "it transacts business" might have been substituted for the words "its home office is located".

Section 627 does not contain any state tax exemption and none was intended. The use of the words "within which its home office is located" are not words of prohibition because in the original enactment no domestic branches existed, and if a bank wished to operate in more than one state, it could incorporate separate organizations to operate in other states of its choice and such organizations would be taxed in those home states, not as branches but as separate corporations.

A reading of the relevant debates on the floor of the Senate and House makes clear that the "home office" language was not meant to exempt Edge banks from State taxation. In fact, there are numerous statements by the legislators which indicate a specific intent that Edge corporations be subject to state and local tax in the same manner and to the same extent as other corporations. See: 58 Cong. Rec. 4969 (1919).

The taxpayer's further contention that Section 627 represents an expression of Congressional exercise of the

federal supremacy power under Article 6, clause 2 of the United States Constitution, and the imposition of an express statutory ban on state taxation of Edge Act banks is a self-serving conclusion without legal substantiation. The taxpayer points to no instance in the legislative process of Edge Act enactments wherein any legislative member stated that Edge Act corporations would be exempt from state taxation or that they may be characterized as tax-immune instrumentalities of the federal government. Moreover, the taxpayer's final conclusion proclaiming that any judicial decision on the issue in the matter at hand, by this administratve agency or the New York courts, would constitute an illegal assumption of a legislative function which would be violative of an essential element of governmental separation of powers is unacceptable, as is taxpayer's suggestion that the City of New York has an obligation to seek repeal of Section 627 of the Edge Act before it can assert a right to tax such banks that are doing business within the City.

CONCLUSION

On my examination of this entire record and all the legal arguments which have been presented, including the legislative background materials, it is clear that the purpose of Edge corporations as well as the manner in which they are organized and operate, are quite different from the objectives, purposes, operations and formation of national banks. Therefore, express Congressional permission for State/local taxation is unnecessary. I am likewise convinced that these federally chartered Edge corporations are not instrumentalities of the federal government but rather, they are privately owned corporations engaged in international financing of business transactions for profit. The fact that such organizations enhance the American export trade with

foreign countries, consistent with federal policy, is incidental and insufficient to justify a tax-immunity status since there is no performance of any governmental function and no justification for shielding such organizations from bearing their fair share of the costs of local governments wherein they receive services and economic benefits.

In its existing form, Section 627 is clearly language of an affirmative approval of state taxation, as was intended at the time of its enactment. The section has no words of exemption either expressed or implied. Accordingly, there is no Federal law or Constitutional barrier upon which this taxpayer can premise its claim for tax exemption or tax immunity.

DECISION:

Therefore, the City's tax assessments as updated for additional interest to January 15, 1984 are affirmed as follows:

Tax Periods	*Tax Principal*	*Interest*	*Total*
9/1/80-12/31/80	$1,040,475.32	$ 367,329.41	$1,407,804.73
1/1/81-12/31/81	3,779,393.98	888,130.64	4,667,524.62
Total	$4,819,869.30	$1,255,460.05	$6,075,329.35

Gennaro G. Columbus, Esq.

Continental Bank International (E.I.N. 36-3084835)
As successor in Reorganization to
Continental Bank International (E.I.N. 13-1968348)
231 South La Salle Street
Chicago, Illinois 60693

Findings of the City of New York, Department of Finance

Audit Nos. SFTX 26, LFTX-54 FTX
E.I.N. 36-30834835

By: John A. Garraty, Jr. and,
John M. Callagy, Esqs.
c/o Kelly, Drye & Warren
101 Park Avenue
New York, N.Y. 10178

/s/ GENNARO G. COLUMBUS
Gennaro G. Columbus
Formal Referee

Approved:

/s/ ROBERT KRAUT
Robert Kraut,
Director
Bureau of Hearings

APPENDIX D

Remittitur of the New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK

The HON. SOL WACHTLER, *Chief Judge, Presiding*

In the Matter of
THE CONTINENTAL BANK INTERNATIONAL,

Appellant,

—v.—

CITY OF NEW YORK, DEPARTMENT OF FINANCE,

Respondent.

The appellant(s) in the above entitled appeal appeared by Sullivan and Cromwell, Esqs.; the respondent appeared by Hon. Frederick A. O. Schwarz, Jr., Corporation Counsel, City of New York; the amici curiae appeared by Jo-Ann Horn, Esq.; Michael G. DeAngelis, Esq.; and Cleary, Gottlieb, Steen and Hamilton, Esqs.

The Court, after due deliberation, orders and adjudges that the judgment affirmed, with costs. Opinion by Judge Titone. Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Hancock and Bellacosa concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/S/ DONALD M. SHERAW
Donald M. Sheraw
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, February 19, 1987.

APPENDIX E

Notice of Appeal as Filed in the New York Court of Appeals on May 11, 1987

COURT OF APPEALS

STATE OF NEW YORK

New York County Clerk's Index No. 16365/84

In the Matter of the Application of
CONTINENTAL BANK INTERNATIONAL,

Petitioner,

—against—

CITY OF NEW YORK, DEPARTMENT OF FINANCE,

Respondent,

Pursuant to Article 78 of the CPLR.

SIRS:

PLEASE TAKE NOTICE that pursuant to 28 U.S.C. § 1257 (2) petitioner Continental Bank International hereby appeals to the Supreme Court of the United States from the judgment of this Court entered herein on February 19, 1987 affirming the judgment of the Appellate Division, First Department, entered on February 20, 1986, and petitioner appeals from each and every part of said judgment as well as from the whole thereof.

Dated: New York, New York
May 8, 1987

/s/ SULLIVAN & CROMWELL
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
(212) 558-4000

Attorneys for Petitioner
Continental Bank International

Notice of Appeal

To:

CLERK OF THE COUNTY OF NEW YORK -

HON. PETER L. ZIMROTH
Corporation Counsel for the
City of New York
100 Church Street
New York, New York 10007
Attention of Joseph V. Hamilton, Jr., Esq.
Attorney for Respondent
City of New York,
Department of Finance

HON. ROBERT ABRAMS
Attorney General of the State of
New York
Attention of the Solicitor General
The Capital, Room 220
Albany, New York 12224

Certification of Service

The undersigned, an attorney duly admitted and licensed to practice before this Court and counsel for appellant Continental Bank International, hereby certifies pursuant to Rule 28.5 of the Supreme Court of the United States, that on May 8, 1987, he caused one copy of the within Notice of Appeal to be served by hand upon the only party required to be served, Respondent City of New York, Department of Finance at the office of its counsel Hon. Peter L. Zimroth, Corporation Counsel of the City of New York, 100 Church Street, New York, New York 10007, attention of Joseph V. Hamilton, Jr., Esq.

/s/ EDWARD W. KEANE
Edward W. Keane

SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
(212) 558-4000

Copy of Notice of Appeal Filed in the Supreme Court of New York, New York County, on May 8, 1987

COURT OF APPEALS

STATE OF NEW YORK

New York County Clerk's Index No. 16365/84

In the Matter of the Application of
CONTINENTAL BANK INTERNATIONAL,

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Dated: New York, New York
May 8, 1987

/s/ SULLIVAN & CROMWELL
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(212) 558-4000
Attorneys for Petitioner
Continental Bank International

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To:

CLERK OF THE COUNTY OF NEW YORK

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Corporation Counsel for the
City of New York
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/s/ EDWARD W. KEANE
Edward W. Keane

SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
(212) 558-4000

APPENDIX F

Relevant Constitutional, Statutory and Regulatory Provisions

ARTICLE VI, CLAUSE 2 OF THE CONSTITUTION OF THE UNITED STATES

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

TITLE 12 OF THE UNITED STATES CODE

§ 611. Formation authorized; fiscal agents; depositaries in insular possessions

Corporations to be organized for the purpose of engaging in international or foreign banking or other international or foreign financial operations, or in banking or other financial operations in a dependency or insular possession of the United States, either directly or through the agency, ownership or control of local institutions in foreign countries, or in such dependencies or insular possessions as provided by this subchapter and to act when required by the Secretary of the Treasury as fiscal agents of the United States, may be formed by any number of natural persons, not less in any case than five: *Provided,* That nothing in this subchapter shall be construed to deny the right of the Secretary of the Treasury to use any corporation organized under this subchapter as depositaries in Panama and the Panama Canal Zone, or other insular possessions and dependencies of the United States.

The Congress declares that it is the purpose of this subchapter to provide for the establishment of international

§ 611a. Statement of purposes; rules and regulations

banking and financial corporations operating under Federal supervision with powers sufficiently broad to enable them to compete effectively with similar foreign-owned institutions in the United States and abroad; to afford to the United States exporter and importer in particular, and to United States commerce, industry, and agriculture in general, at all times a means of financing international trade, especially United States exports; to foster the participation by regional and smaller banks throughout the United States in the provision of international banking and financing services to all segments of United States agriculture, commerce, and industry, and, in particular small business and farming concerns; to stimulate competition in the provision of international banking and financing services throughout the United States; and, in conjunction with each of the preceding purposes, to facilitate and stimulate the export of United States goods, wares, merchandise, commodities, and services to achieve a sound United States international trade position. The Board of Governors of the Federal Reserve System shall issue rules and regulations under this subchapter consistent with and in furtherance of the purposes described in the preceding sentence, and, in accordance therewith, shall review and revise any such rules and regulations at least once every five years, the first such period commencing with the effective date of rules and regulations issued pursuant to section 3(a) of the International Banking Act of 1978, in order to ensure that such purposes are being served in light of prevailing economic conditions and banking practices.

[As amended Sept. 17, 1978, Pub. L. 95-369, § 3(c), 92 Stat. 608.]

§ 613. Signing of articles of association; forwarding to and filing by Board of Governors of the Federal Reserve System; organization certificate; contents

Articles of association described in section 612 of this title shall be signed by all of the persons intending to participate in the organization of the corporation and, thereafter, shall be forwarded to the Board of Governors of the Federal Reserve System and shall be filed and preserved in its office. The persons signing the said articles of association shall, under their hands, make an organization certificate which shall specifically state:

First. The name assumed by such corporation, which shall be subject to the approval of the Board of Governors of the Federal Reserve System.

Second. The place or places where its operations are to be carried on.

Third. The place in the United States where its home office is to be located.

Fourth. The amount of its capital stock and the number of shares into which the same shall be divided.

Fifth. The names and places of business or residence of the persons executing the certificate and the number of shares to which each has subscribed.

Sixth. The fact that the certificate is made to enable the persons subscribing the same, and all other persons, firms, companies, and corporations, who or which may thereafter subscribe to or purchase shares of the capital stock of such corporation, to avail themselves of the advantages of this subchapter.

§ 615. Powers of corporation

Each corporation organized as provided in sections 611 to 614 of this title shall have power, under such rules and

regulations as the Board of Governors of the Federal Reserve System may prescribe:

(a) Dealings in drafts, checks, bills of exchange, acceptances, and other evidences of indebtedness; purchase and sale of securities; letters of credit; purchase and sale of coin, bullion, and exchange; borrowing and loaning money; issue of debentures, bonds, and notes; deposits; limitation of liabilities; reserves

To purchase, sell, discount, and negotiate, with or without its indorsement or guaranty, notes, drafts, checks, bills of exchange, acceptances, including bankers' acceptances, cable transfers, and other evidences of indebtedness; to purchase and sell, with or without its indorsement or guaranty, securities, including the obligations of the United States or of any State thereof but not including shares of stock in any corporation except as herein provided; to accept bills or drafts drawn upon it subject to such limitations and restrictions as the Board of Governors of the Federal Reserve System may impose; to issue letters of credit; to purchase and sell coin, bullion, and exchange; to borrow and to lend money; to issue debentures, bonds, and promissory notes under such general conditions as to security and such limitations as the Board of Governors of the Federal Reserve System may prescribe; to receive deposits outside of the United States and to receive only such deposits within the United States as may be incidental to or for the purpose of carrying out transactions in foreign countries or dependencies or insular possessions of the United States; and generally to exercise such powers as are incidental to the power conferred by this Act or as may be usual, in the determination of the Board of Governors of the Federal Reserve System, in connection with the transaction of the business of banking or other financial operations in the countries, colonies, dependencies, or possessions in which it shall

transact business and not inconsistent with the powers specifically granted herein. Nothing contained in this subchapter shall be construed to prohibit the Board of Governors of the Federal Reserve System, under its power to prescribe rules and regulations, from limiting the aggregate amount of liabilities of any or all classes incurred by the corporation and outstanding at any one time. Whenever a corporation organized under this subchapter receives deposits in the United States authorized by this subchapter, it shall carry reserves in such amounts as the Board of Governors of the Federal Reserve System may prescribe for member banks of the Federal Reserve System.

(b) Branches or agencies

To establish and maintain for the transaction of its business branches or agencies in foreign countries, their dependencies or colonies, and in the dependencies or insular possessions of the United States, at such places as may be approved by the Board of Governors of the Federal Reserve System and under such rules and regulations as it may prescribe, including countries or dependencies not specified in the original organization certificate.

(c) Purchase of stock in other corporations

With the consent of the Board of Governors of the Federal Reserve System to purchase and hold stock or other certificates of ownership in any other corporation organized under the provisions of this subchapter, or under the laws of any foreign country or a colony or dependency thereof, or under the laws of any State, dependency, or insular possession of the United States but not engaged in the general business of buying or selling goods, wares, merchandise, or commodities in the United States, and not transacting any

business in the United States except such as in the judgment of the Board of Governors of the Federal Reserve System may be incidental to its international or foreign business: *provided, however,* That, except with the approval of the Board of Governors of the Federal Reserve System, no corporation organized under this subchapter shall invest in any one corporation an amount in excess of 10 per centum of its own capital and surplus, except in a corporation engaged in the business of banking, when 15 per centum of its capital and surplus may be so invested: *Provided further,* That no corporation organized under this subchapter shall purchase, own, or hold stock or certificates of ownership in any other corporation organized under this subchapter or under the laws of any State which is in substantial competition therewith, or which holds stock or certificates of ownership in corporations which are in substantial competition with the purchasing corporation.

Nothing contained herein shall prevent corporations organized under this subchapter from purchasing and holding stock in any corporation where such purchase shall be necessary to prevent a loss upon a debt previously contracted in good faith; and stock so purchased or acquired in corporations organized under this subchapter shall, within six months from such purchase, be sold or disposed of at public or private sale, unless the time to so dispose of same is extended by the Board of Governors of the Federal Reserve System.

[As amended Sept. 17, 1978, Pub. L. 95-369, § 3(c), 92 Stat. 609.]

§ 616. Place of carrying on business; when business may be begun

No corporation organized under this subchapter shall carry on any part of its business in the United States except

such as, in the judgment of the Board of Governors of the Federal Reserve System, shall be incidental to its international or foreign business: *And provided further,* That except such as is incidental and preliminary to its organization, no such corporation shall exercise any of the powers conferred by this subchapter until it has been duly authorized by the Board of Governors of the Federal Reserve System to commence business as a corporation organized under the provisions of this subchapter.

§ 625. Stockholders' meetings; books and records; reports; examination

Every corporation organized under the provisions of this subchapter shall hold a meeting of its stockholders annually upon a date fixed in its bylaws, such meeting to be held at its home office in the United States. Every such corporation shall keep at its home office books containing the names of all stockholders thereof, and the names and addresses of the members of its board of directors, together with copies of all reports made by it to the Board of Governors of the Federal Reserve System. Every such corporation shall make reports to the Board of Governors of the Federal Reserve System at such times and in such form as it may require; and shall be subject to examination once a year and at such other times as may be deemed necessary by the Board of Governors of the Federal Reserve System by examiners appointed by the Board of Governors of the Federal Reserve System, the cost of such examinations, including the compensation of the examiners, to be fixed by the Board of Governors of the Federal Reserve System and to be paid by the Corporation examined.

§ 627. State taxation

[Set forth at page 3.]

Relevant Statutes

REVISED STATUTES—SECTION 5219*

Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes, to the same extent, according to its value, as other real property is taxed.

ADMINISTRATIVE CODE OF THE CITY OF NEW YORK

§ R46—37.1 Imposition of tax.

(a) For the privilege of doing business in the city in a corporate or organized capacity, a tax, computed under section R46-37.5, is hereby annually imposed on every banking corporation for each of its taxable years, or any part thereof, beginning on or after January first, nineteen hundred seventy-three.

* * *

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* Act of February 10, 1868, c. 7, 15 Stat. 34, amending the Act of June 3, 1864, c. 106, § 41, 13 stat. 111. This statute was amended again in 1923, 1926 and 1969 and appears in its current formulation at 12 U.S.C. § 548.

Relevant Statutes

§ R46—37.2 Banking corporation defined; exempt corporations.

(a) For the purpose of this subpart, a banking corporation means:

* * *

(3) every national banking association organized under the authority of the United States which is doing a banking business in the city;

(4) every federal savings and loan association which is doing a banking business in the city;

(5) a production credit association organized under the federal farm credit act of nineteen hundred thirty-three, which is doing a banking business in the city and all of whose stock held by the federal production credit corporation has been retired;

(6) every other corporation or association organized under the authority of the United States which is doing a banking business in the city;

* * *

§ R46—37.3 Computations of entire net income.

(a) Entire net income means total net income from all sources which shall be the same as the entire taxable income which the taxpayer is required to report to the United States treasury department, except as hereinafter provided.

* * *

§ R46—37.4 Allocation of entire net income.

If the taxpayer's entire net income is derived from business carried on both within and without the city, the portion thereof which is derived from business carried on within the city shall be allocated under rules and regulations prescribed by the finance administrator.

Relevant Statutes

REGULATION K (March 23, 1920)

VIII. Operations in the United States.

No corporation shall carry on any part of its business in the United States except such as shall be incidental to its international or foreign business. Agencies may be established in the United States with the approval of the Federal Reserve Board for specific purposes, but not generally to carry on the business of the Corporation.

X. Branches.

No Corporation shall establish any branches except with the approval of the Federal Reserve Board, and in no case shall any branch be established in the United States.

Supreme Court, U.S.
FILED
JUL 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1857

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CONTINENTAL BANK INTERNATIONAL,

Appellant,

-against-

CITY OF NEW YORK, DEPARTMENT OF FINANCE,

Appellee.

On Appeal from the Court of Appeals
for the State of New York

MOTION TO DISMISS OR AFFIRM

PETER L. ZIMROTH,
Corporation Counsel
of the City of New York,
Attorney for Appellee,
100 Church Street,
New York, New York 10007.
(212) 566-3327 or 3005

EDITH I. SPIVACK,
GALE ZAREKO,
GLENN NEWMAN,
JOSEPH V. HAMILTON, JR.,
JAMES F. ELLER,

of Counsel.

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No. 86-1857

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CONTINENTAL BANK INTERNATIONAL,

Appellant,

-against-

CITY OF NEW YORK, DEPARTMENT OF FINANCE,

Appellee.

On Appeal from the Court of Appeals
for the State of New York

MOTION TO DISMISS OR AFFIRM

Appellee moves to dismiss the appeal or, alternatively, to affirm the judgment appealed from on the grounds that none of the questions stated in the Jurisdictional Statement presents a substantial federal question and that the questions on which the decision of the cause

depends are manifestly so unsubstantial as to require no further argument.

QUESTIONS PRESENTED

Is a corporation organized under the Edge Act (12 U.S.C. §§611-631), which has a home office in another state and a branch office in New York City, immune from taxation of the business done by the New York branch office?

Subsidiary questions are:

1. Is such an Edge corporation a federal instrumentality?

2. Has Congress prohibited, in 12 U.S.C. §627 or elsewhere, taxation of such an Edge corporation by the state in which the branch office is located?

Although appellant seeks to inject a question of the right of Edge corporations to establish domestic branches, the Court below did not hold that branch offices were unlawful, and the City's right to tax Edge corporations on their branch operations in the City does not depend on

whether or not the Federal Reserve Board was given the power to authorize domestic branches.

PRELIMINARY STATEMENT

The appeal is from a judgment of the Court of Appeals of the State of New York, entered February 19, 1987, which unanimously affirmed a judgment of the Appellate Division of the Supreme Court of that State. J.S. Appendix D1*. The Appellate Division had reviewed and unanimously confirmed, without opinion, a determination of appellee's Commissioner of Finance that appellant owed New York City financial corporation tax. J.S. Appendix B1-B2. The determination was issued after a hearing at which evidence was taken and findings made. See Findings at J.S. Appendix C1-C17.

The opinion of the Court of Appeals is

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*References preceded by "J.S." refer to pages in Appellant's Jurisdictional Statement or appendix thereto.

business in the City, in a corporate or organized capacity, upon banking corporations whether organized under the laws of New York, the laws of any other state or country, or the laws of the United States. N.Y.C. Admin. Code §§R46-37.1(a), -37.2(a). The basic tax was a percentage of "entire net income," as defined in the law, except that where such income was derived from business carried on both within and without the City, only the portion of such income derived from business carried on within the City was taxable*. N.Y.C. Admin. Code §§R46-37.4, -37.53(a).

Some pertinent portions of the City law are set forth at pages F8 to F9 of appellant's Jurisdictional Statement. In addition to the paragraphs relating to corporations organized

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*Although some of the provisions have been amended, the above description of the tax is still accurate.

under federal law which come within the definition of a taxable "banking corporation" quoted at page F9, the definition contains the following pertinent paragraphs (N.Y.C. Admin. Code §R46-37.2):

> "(a) For the purpose of this subpart a banking corporation means:
>
> (1) Every corporation or association organized under the laws of this state which is authorized to do a banking business or which is doing a banking business in the city;
>
> (2) every corporation or association organized under the laws of any other state or country which is doing a banking business in the city;
>
> * * * "

(2)

The City tax is imposed pursuant to a New York State enabling act. The enabling act (L. 1966, c. 772, §1, as amended by L. 1981, c.

1015, §8)* authorizes any city having a population of one million or more to impose specified taxes on general, financial, insurance and transportation corporations. Included is authorization for a tax such as is imposed by Article 32 of the State's Tax Law (§§1450-1468 (McKinney 1975)), with certain exceptions not here relevant. Article 32 imposes the State franchise tax on banking corporations. The City tax in question is a tax such as is imposed by this Article, but it is limited to business in the City. The State tax is applicable State-wide.

STATEMENT OF THE CASE

Appellant is a corporation organized under the Edge Act. 12 U.S.C. §§611-631. The Edge Act was enacted in 1919, shortly after World War I, (41 Stat. 378) to provide Europe with

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*The enabling act with all amendments is in the appendix to N.Y. General City Law (McKinney 1968, 1987 pocket part, pp. 131-132).

international credit and to secure foreign markets for domestic exports. See 58 Cong. Rec. 8082-8083 (statement of Rep. Phelan); Note, A Constitutional and Statutory Analysis of State Taxation of Edge Act Corporate Branches, 51 Fordam L. Rev. 994-995 (1983). Edge corporations* were permitted to provide financing for international transactions, establish overseas branches, receive deposits in the United States only when incidental to international business transactions, and invest in the stock of certain other corporations engaged in business abroad. 12 U.S.C. §615.

The Federal Reserve Board interpreted the authorization for Edge corporations to have

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*Although appellant refers to Edge corporations as banks, the Edge Act and the Federal Reserve Board regulations refer to these entities as "corporations," rather than "banks" (See, e.g., 12 U.S.C. §611; Reg K, 12 C.F.R. §211.4).

"branches or agencies in foreign countries, their dependencies or colonies, and in the dependencies or insular possessions of the United States" (12 U.S.C. §615(b)) as prohibiting domestic branches. Reg. K at 12 C.F.R. §211.6 (1978). Accordingly, separate Edge corporations were formed for each state in which the incorporators wished to have an office for doing business as an Edge corporation.

Thus, prior to 1980, appellant's parent, Continental Illinois National Bank and Trust Company of Chicago ("Continental Illinois") had four subsidiaries organized under the Edge Act, each of which did business in a different state. One of these subsidiaries conducted the same business in New York City as appellant. Its home office was in the City, and it paid the City's financial corporation tax without dispute. The Edge Act from its inception to the present provided that an Edge corporation "shall be subject to tax by the State within which its home

office is located in the same manner and to the same extent as other corporations organized under the laws of that State which are transacting a similar character of business."

In 1978 the Edge Act was amended by the International Banking Act of 1978, §3, Pub. L. 95-369, 92 Stat. 607. This Act required the Federal Reserve Board "to review and revise its rules, regulations and interpretations", issued pursuant to the Edge Act, to eliminate or modify restrictions, conditions, or limitations not required by the Edge Act that (1) discriminate against foreign-owned banking institutions, (2) put Edge corporations at a disadvantage in competing with foreign-owned banking institutions, or (3) impede the attainment of the purposes of the Act, as amended (§3(a) at 92 Stat. 608).

Among the amendments made by the Federal Reserve Board to its Regulation K in 1979 was a provision that, with prior Board approval, an

states to tax Edge corporations previously subject to tax. See, e.g., S. Rep. No. 95-1073, 95th Cong., 2d Sess., reprinted in 3 U.S. Code Cong. & Ad. News 1421-1426, 1440-1441 (1978). Nor is there any indication that this was the purpose of the Federal Reserve Board in changing its former regulation which had prohibited domestic branches. Nevertheless, appellant claims that 12 U.S.C. §627, which was intended only to prevent discriminatory taxation, immunizes a branch office of an Edge Corporation from tax in the state where it is located and doing business, merely because of a change in Regulation K made for other purposes.

ARGUMENT

AS AN EDGE CORPORATION IS NOT A FEDERAL INSTRUMENTALITY AND AS CONGRESS HAS NOT PROHIBITED THE TAX, THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A state or political subdivision may tax a federally-franchised corporation unless the corporation is a federal instrumentality* or unless Congress, in the exercise of one of the powers granted by the Constitution, prohibits the tax. See, e.g., Broad River Power Co. v. Query, 288 U.S. 178, 181 (1933); Western Union Telegraph Co. v. Massachusetts, 125 U.S. 530, 548 (1888). As neither alternative exists with respect to Edge corporations, they are not immune from the tax in question.

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*Of course, even a federal instrumentality may be taxed if Congress consents.

I. Congress has not prohibited the tax.

A

Appellant's principal contention is that 12 U.S.C. §627 prohibits taxation of Edge corporations by states other than the home state. This contention is without merit, both because Section 627 contains no words of prohibition and because the legislative history shows that the section was not intended to immunize Edge corporations from state or local taxation.

The first sentence of Section 627 merely provides that an Edge corporation may be taxed in the state where its home office is located in a nondiscriminatory manner. The second sentence provides for nondiscriminatory taxation of shares of stock in an Edge corporation as the personal property of the stockholders. The statute speaks of no tax immunity or special tax exemption. It is the prohibition of discrimination which is the statute's function. See First

Federal S. & L. v. Massachusetts Tax Comm'n, 437 U.S. 255, 258 n.2 (1978), reflecting policy analysis of Mercantile Bank v. New York, 121 U.S. 138 (1887); statement of Rep. Phelan, 58 Cong. Rec. 8083 (1919). Both of the cases which have construed Section 627 since the Federal Reserve Board in 1979 permitted Edge Corporations to have domestic branches have reached the same conclusion and have upheld the tax there involved. City of Houston v. Morgan Guaranty International Bank, 666 S.W.2d 524 (Tex. Ct. App. 1983), cert. denied 469 U.S. 1213 (1985) (tax on shares of stock of an Edge corporation); opinion below, 69 NY2d 281, 286, 506 N.E.2d 525, 527 (1987).

The reference in Section 627 to the Edge corporation's home office state is merely descriptive of the place within the continental United States where an Edge corporation in 1919 could locate and, therefore, be subject to the state's taxing jurisdiction. Branches or agencies

were authorized only in foreign countries and in dependencies or insular possessions of the United States. 12 U.S.C. §615(b).* The Federal Reserve Board regulations expressly prohibited branches in the United States, as well as agencies to generally carry on the Edge corporation's business. Only agencies for "specific" (later changed to "special") purposes were permitted. Reg. K at 12 C.F.R. §211.6

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*The legislative history shows that Congress intended to prohibit domestic branches and understood the bill it enacted to do so. Moreover, a provision which would have expressly permitted "agencies in the United States" was deleted at the Senate-House Conference. See 58 Cong. Rec. 7854, 7856-7857, 8100, 8102; 59 Cong. Rec. 49.

It was of serious concern that the Edge corporations might become vehicles for capital concentration by "the patriots up in Wall Street." 59 Cong. Rec. 624-626. The intent was to avoid a money trust, monopolizing American sources of credit. 58 Cong. Rec. 4953-4960, 5073-5074, 7856, 7859, 7894, 7898, 7959, 8083, 8100.

(1978); see also, March 23, 1920 version at J.S., p. F10.

B

The legislative history of the Edge Act shows that Congress intended generally that Edge corporations pay state and local taxes. Certainly, the Congressional debates, read in context and as a whole, show no intent to immunize them.

(1)

The original bill, which was drafted by counsel for the Federal Reserve Bank, contained only the present 12 U.S.C. §§ 611-625, without Section 627. Hearings on S.2427 Before Committee on Banking and Currency, 66th Cong., 1st Sess. (July 23, 1919), pp. 3-4. When Senator Edge, who sponsored the bill, was asked whether immunity from state taxation was contemplated, he replied (58 Cong. Rec. 4955):

> "Not at all. *** there is no intention on the part of the original compiler of the bill to have it escape taxation *** his

any other corporation doing business in that State."

(2)

Amendments were made to the bill in the House of Representatives. One of the amendments considered would have made Edge corporations "subject to tax in the same manner and to the same extent as national banking associations." House Banking and Currency Committee Hearings, 66th Cong., 3rd Sess. (Sept. 25, 1919), pp. 102-105. This proposal was rejected,* and the bill submitted to the

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*Although appellant would analogize Edge corporations to national banks, Congress terminated the earlier immunity provisions for national banks in 1969. P.L. 91-156, 83 Stat. 434 (1969). Among other provisions a so-called permanent amendment was adopted which, after a moratorium which expired in 1976, ended all immunity of national banks, and permits any state to tax a national bank in the same manner as a bank organized and existing under the laws of the state where the national bank's principal office is located. Id., §2, now at 12 U.S.C. §548 (Supp. 1987); for moratorium

(Footnote Continued)

House on November 1, 1919 included the present Section 627, but with an added proviso limiting the authority to tax shareholding to "the city or town in which the corporation's home office is located and not elsewhere". (Emphasis supplied.) 58 Cong. Rec. 7853-7854. The proviso was deleted at the Senate-House Conference (H.R. Rep. No. 473, Conference Rep. on S.2472, Nov. 17, 1919, at Amendment No. 36), and Section 627 was enacted in its present form without the proviso. However, the proviso does show that, if Congress had wanted to limit state and local taxation to the state where the home office was located, it knew how to do so, i.e., by adding the words "and not elsewhere". Instead, as indicated by Representative Phelan, a bill

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(Footnote Continued)
provisions, see P.L. 92-213, 85 Stat. 775 (1971); P.L. 93-100, §7, 87 Stat. 342, 347-348 (1973); P.L. 94-222, §1, 90 Stat. 197 (1976).

manager, in referring to Section 627 as a whole (58 Cong. Rec. 8083):

> "This section was intended to prevent discrimination by the states in the taxation of a corporation organized under this law."

C

Where immunity from tax is claimed by virtue of an Act of Congress, the normal rule is against tax exemption by statutory implication. Oklahoma Tax Comm'n v. United States, 319 U.S. 598, 604 (1943); Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342, 366-367 (1949); United States v. Mason, 412 U.S. 391, 394 (1973); cf. Rockford Life Ins. Co. v. Ill. Dept of Rev., __U.S.__, ___ (1987) (slip op. 9-10). Thus, the provision in 12 U.S.C. §627 for nondiscriminatory taxation by the state where an Edge corporation's home office is located does not imply prohibition of taxation by other states. This is particularly so since the legislative history shows a contrary intent and, also, since

domestic branch offices were not authorized when Section 627 was enacted.

Here we have the extraordinary claim of tax immunity resulting merely from a change in the regulations of the Federal Reserve Board to permit domestic branches. While Congress in 1978 amended the Edge Act to authorize the FRB to revise its regulations to eliminate restrictions, not required by the Act, which discriminate against foreign-owned banking institutions and unnecessarily restrict Edge corporations in competing with them, there is nothing in the 1978 legislation or its history to suggest that Congress intended to prohibit taxation by the states where Edge corporations carried on their business and had been taxed for many years. Certainly, such an important change in policy and such a serious encroachment upon the states' power to tax would have been clearly stated in the 1978 legislation, itself.

As Justice Stone said in Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 480 (1939), "[s]ilence of Congress implies immunity no more than does the silence of the Constitution."

II. An Edge corporation is not a federal instrumentality.

Appellant did not establish, nor could it do so, that it is a federal instrumentality and that, therefore, express federal permission to tax it is required. An Edge corporation is plainly lacking in those characteristics which determine that status and confer tax exemption on that ground.

Rather, appellant proposes a novel "federal banking instrumentalities" rule, derived by extending now-obsolete national bank cases to the present circumstance. However, this self-serving rule does not survive scrutiny because appellant's analogy of Edge corporations to national banks is not supported by law, legislative history or fact.

A

There is no express designation of Edge corporations as federal instrumentalities, as is the case with other institutions expressly given that status. See, e.g., Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 96-97 (1941) (mortgages executed to Federal land banks declared by Section 26 of Federal Farm Loan Act of 1916 to be instrumentalities of Government of United States); Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 476 (1939) (Home Owners' Loan Corporation declared by Section 4(a) of Home Owners' Loan Act of 1933 to be instrumentality of United States).

Nor is there any implied designation stemming from their inna[illegible] character. Edge corporations are wholly lacking in those organizational and operational characteristics which would indicate that they have been "incorporated into the government structure" and which this Court has held to be necessary to

the United States is liable for the payment of any bond or other obligation * * * issued or incurred by any * * * [Edge corporation]." 12 U.S.C. §631.

Third, although Edge corporations perform a beneficial service, fostering international trade, performance of such service is not governmental, and does not confer tax immunity. United States v. Boyd, 378 U.S. 39, 44 (1964). There is a significant difference between an essential governmental function -- one performed by or at the behest of the government -- and a mere beneficial service -- one performed for the benefit of a narrow segment of the commercial public.

Last, any implication of federal instrumentality status based on the federal charters granted to Edge corporations is negated by the fact that federal charters were designed merely to enhance their prestige, particularly abroad. 58 Cong. Rec. 8082-8083. Hence,

federal incorporation was primarily for the benefit of the Edge corporations, not the federal government. Moreover, Edge corporations are privately owned, profit motivated institutions, a status clearly at odds with that of a federal instrumentality. See, e.g., United States v. New Mexico, 455 U.S. at 739, 740.

B

(1)

Appellant argues that there is a "long-established" and "long-standing" constitutional principle that the states are without power, unless explicitly authorized by Congress, to tax federally created banks, J.S. 10, 20, and that this principle applies to Edge corporations. Appellant states that this principle was "first announced" in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (J.S. 9), "antedate[s] the Edge Act," citing Owensboro Nat'l Bank v. Owensboro, 173 U.S. 664, 668 (1899) (J.S. 10), and was "approved

by this Court" in First Agricultural Nat'l Bank v. State Tax Commission, 392 U.S. 339, 340 (1968) (J.S. 9).

(2)

There are numerous short-comings in appellant's novel "federal banking instrumentalities" rule, resulting from errors in analysis of both case law and the particular structure and operation of Edge corporations.

M'Culloch, supra, involved banking only incidentally. The functions of the second Bank of the United States were significant only to authenticate its status as an instrument employed in the substantive operations of the federal government. M'Culloch, 17 U.S at 407-09, 422-23. It was held to be impossible for the nascent federal system to survive if Maryland could, by taxation or otherwise, control a

functionary having that status. Id. at 424, 431-33.*

That this Court recognizes this holding and import of M'Culloch is shown by its statement in Washington v. United States, 460 U.S. 536, 547 (1983), that in M'Culloch "the Court laid down the principle that the property, functions, and instrumentalities of the Federal Government are immune from taxation by its constituent parts." Appellant cannot point to any specific page reference in M'Culloch, nor even suggest any reference, where its purported rule is stated.

Appellant's citations of Owensboro Nat'l Bank v. Owensboro, 173 U.S. 664 (1899), and First Agricultural Nat'l Bank v. State Tax Commission,

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*Nevertheless, M'Culloch recognized the right of the states to tax the Bank's real estate and shareholder capital, prohibiting only those state taxes that conflicted with the Bank's federal governmental aspects. M'Culloch, 17 U.S. at 436.

392 U.S. 339 (1968), lend no additional support. The decision in Owensboro was based upon the assumption that national banks, as agencies created for carrying into effect national powers granted by the Constitution, were instrumentalities of the federal government. Owensboro, 173 U.S. at 667-68. In short, Owensboro addressed a specific problem; its rationale has not been shown to have been applied to any other federally chartered financial institutions.

Similarly, this Court's decision in First Agricultural Nat'l Bank, supra, did not confirm the principle that all federal banking institutions are tax-immune federal instrumentalities. Rather, it was a statement that the principle of tax-immune, federal instrumentality status for national banks had become settled law and could be changed only by Congress. First Agricultural Nat'l Bank, 392 U.S. at 346. Thus,

appellant cannot cite any specific case where its novel rule is enunciated or even suggested.

(3)

The differences between Edge corporations and national banks are more extensive and more significant than appellant would have this Court believe. Edge corporations are not "banks," nor does the statute or Federal Reserve Board refer to them as such.* 12 C.F.R. §211. Edge corporations were excluded from the definition of "bank" when the Bank Holding Company Act was enacted in 1956, 12 U.S.C. §1841(c) (1982); national banks were included. Edge corporations are not permitted to be members of the Federal Reserve system; national banks must be members. 12 U.S.C. §§222, 621 (1982).

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*Congress did not regard them as "banks". 58 Cong. Rec. 8100-8102.

only the second sentence of Section 627, dealing with shareholder taxation, has a comparable provision in Section 5219.

Appellant's contention that Section 627 and Section 5219 are in pari materia is also without merit. Apfel v. Mellon, 33 F.2d 805 (D.C. Cir.), cert. denied 280 U.S. 585 (1929), the only case cited by appellant to support this argument, construes a different section of the Edge Act (§614) dealing with approval of applications to establish Edge corporations. It has nothing to do with taxation or Section 627. The fact that Congress deliberately chose a different tax provision for Edge corporations than for national banks establishes that Congress intended different tax treatment.

Appellant's interpretation of Section 627 seeks for Edge corporations a greater tax exemption than national banks have ever enjoyed. Apart from the patent lack of merit in

this position, there is nothing in the legislative history to support it.

CONCLUSION

The appeal should be dismissed or the judgment of the Court below affirmed.

Dated: July 10, 1987

Respectfully submitted,

PETER L. ZIMROTH
Corporation Counsel of the
City of New York
Attorney for Appellee

EDITH I. SPIVACK,
GALE ZAREKO,
GLENN NEWMAN,
JOSEPH V. HAMILTON, JR.,
JAMES F. ELLER,

of Counsel.

No. 86-1857

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

CONTINENTAL BANK INTERNATIONAL,
Appellant,

against

CITY OF NEW YORK, DEPARTMENT OF FINANCE,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

Brief *Amicus Curiae* on Behalf of the State of New York

ROBERT ABRAMS
Attorney General of the State of New York, Attorney for Amicus Curiae
The Capitol
Albany, NY 12224
(518) 474-8101

O. PETER SHERWOOD*
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

NANCY A. SPIEGEL
Assistant Attorney General
Of Counsel

Dated: July 15, 1987

**Counsel of Record*

Questions Presented

1. Whether Edge Act (12 USC § 611 *et seq*) corporations are federal instrumentalities constitutionally immune from state and local taxation absent affirmative congressional consent.

2. Whether Congress has by statute (12 USC § 627) exempted from state and local taxation Edge Act corporation branch offices located in states other than such corporation's home office state.

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No. 86-1857

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CONTINENTAL BANK INTERNATIONAL,

Appellant,

against

CITY OF NEW YORK, DEPARTMENT OF FINANCE,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF *AMICUS CURIAE* ON BEHALF OF THE STATE OF NEW YORK

Interest of *Amicus Curiae*

Since the passage of the Edge Act (12 USC § 611 *et seq.*) in 1919, over 100 corporations organized under the Act have been established and are currently doing business in the State of New York. Until now, there has been no question that all such corporations are subject to state taxation under either Article 32 ("Franchise tax on banking corporations") or, in a few instances, Article 9-A ("Franchise tax on business corporations") of the New York Tax Law (§ 1450 *et seq.* and § 208 *et seq.*, respectively). The current annual income to the State of New York from the taxes imposed on Edge corporations is approximately $2,000,000.

Until a change in the regulations of the Federal Reserve Board adopted in 1979, corporations organized under the Edge Act had been foreclosed from establishing branch offices within the United States.[1] Thus, every such corporation had to be individually chartered and, pursuant to 12 USC § 627, was expressly subject to nondiscriminatory taxation in its home state. Since the advent of domestic branching in 1979, a number of Edge corporations originally established in New York have been dissolved and have reemerged as branches of out of state Edge corporations. If, as a result of this litigation, the State of New York may no longer tax these businesses operating in New York, the state will not only suffer an immediate revenue loss, it will no doubt incur further losses in the future as more and more of New York's Edge corporations take advantage of this new loophole by the expedient of corporate reorganization and the establishment of a "home office"

[1] Compare, Regulation K, 12 CFR § 211.6(a) (1979) ("* * * A[n Edge Act] Corporation may not establish any branch in the United States * * *"), with 12 CFR § 211.4(c)(1) (1980) ("* * * With prior Board approval, an Edge Corporation may establish branches in the United States * * *").

outside New York. The interest of the State of New York in the outcome of this proceeding is, therefore, substantial and we respectfully ask the Court to consider this brief in ruling upon appellee's motion to dismiss or affirm.

ARGUMENT

This appeal presents no substantial Federal question.

The issues appellant seeks to raise on this appeal do not warrant this Court's review. As is demonstrated below, the decision of the New York Court of Appeals rejecting appellant's attempt to establish for itself a new tax loophole neither required by the Constitution nor ever contemplated by Congress was clearly correct.

It should also be noted that the only recent decision interpreting 12 USC § 627, the statute at issue here, rejected a claim similar to that urged by appellant and was also found by this Court not to warrant further review. *See, City of Houston v Morgan Guaranty International Bank,* 666 SW2d 524 (Tex App 1983), *cert den,* 469 US 1213 (1985).

A. Edge Act corporations are not federal instrumentalities and have no constitutional immunity from state and local taxation. Affirmative congressional consent to such taxation is therefore unnecessary.

McCulloch v Maryland, 4 Wheat 316 (1819), established the principle, rooted in the Supremacy Clause (US Constn, Art VI, Cl 2), that the federal government and the operations of its instrumentalities are immune from state taxation absent congressional consent. Over the ensuing years, this Court has struggled with the question of what constitutes a federal instrumentality for tax immu-

nity purposes. Recently, in *United States v New Mexico,* 455 US 720 (1982), the Court reviewed the historical development of this doctrine, noting that, contrary to some past interpretations, "a narrow approach to governmental tax immunity accords with competing constitutional imperatives, by giving full range to each sovereign's taxing authority". 455 US at 735-736. The Court further observed that, taken as a whole, its decisions teach "that tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned". 455 US at 735. *See also, Department of Employment v United States,* 385 US 355, 359-360 (1966), and *Standard Oil Co. v Johnson,* 316 US 481, 485 (1942). It is submitted that Edge corporations[2] do not qualify as federal instrumentalities and are therefore not entitled to the benefit of the United States government's state tax immunity.

An Edge corporation is a privately-owned, profit-making enterprise with only peripheral connections to the government. While it is federally chartered and is subject to some regulatory supervision, these factors hardly make an Edge corporation "virtually * * * an arm of the Government", *Department of Employment v. United States,* 385 US at 359-360, and are insufficient to sustain the conclusion that such an entity is a federal instrumentality. *Broad River Power Co. v. Query,* 288 US 178, 180-181 (1933). An Edge corporation is subject to no special federal audits or supervision, no part of its management is appointed by

[2]In its jurisdictional statement, appellant refers to Edge Act corporations as "banks". This designation is not accurate, in that Edge corporations have only limited powers and are not truly banks. It is significant that the terminology used in both the Edge Act itself and the implementing regulations (12 CFR § 211.4) refers only to "corporations", not "banks".

the government, it receives no federal assistance, and most importantly, it performs no governmental functions and fulfills no governmental obligations. *See, Department of Employment v. United States,* 385 US at 359 (holding that the Red Cross is a federal instrumentality based upon the presence of these factors).

Appellant contends that Edge corporations are entitled to the same constitutional immunity as national banks. This position fails for several reasons. First, it is unlikely that, in 1987, this Court would conclude that national banks themselves should continue to be regarded as constitutionally tax immune. In *First Agricultural National Bank of Berkshire Co. v. State Tax Commission,* 392 US 399 (1968), the Court explicitly declined to reach the question of whether national banks have, over the years, retained their character as federal instrumentalities, 392 US at 341, holding instead that the tax at issue was precluded by congressional legislation.[3] 392 US at 343. In dissent,

[3]It is interesting to note that a year after this decision, Congress amended the pertinent legislation to remove the last vestige of national bank tax immunity. As amended by PL 91-156, 83 Stat 434, in 1969, 12 USC § 548 now reads:

> "For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located."

Senate Report No. 91-530 explained the rationale behind the change:

> "There may have at one time been justification for giving national banks privileges and immunities which were denied State banks, under the theory that national banks are peculiarly an instrumentality of the Federal Government, and, as such, hold a unique and distinct position from that of other institutions. Without specifically addressing the question of whether national banks remain, in substance, such a Federal instrumentality, the committee is agreed that there is no longer any justification for Congress continuing to grant national banks immunities from State taxation which are not afforded State banks." 1969 USCCAN 1595.

Justice Marshall (joined by Justices Harlan and Stewart) addressed the constitutional question and concluded that by 1968, national banks had for all intents and purposes become no different from state-chartered banks. 392 US at 356-358. Justice Marshall pointed out that beginning with the passage of the Federal Reserve Act of 1913 (38 Stat 251, as amended, 12 USC § 221 *et seq*), national banks had started to lose those quasi-governmental characteristics which had previously resulted in their designation as federal instrumentalities. *Id.* Thus, he would hold "that national banks, today, are not immune from nondiscriminatory state taxation as federal instrumentalities". 392 US at 358-359.

Second, there are a significant number of legal and functional differences between national banks and Edge corporations which preclude the mechanical expansion of the former's immunity to cover the latter.[4] For example, Edge corporations are prohibited from being members of the Federal Reserve System, while national banks are required to join. 12 USC §§ 621, 222. The activities of Edge corporations are restricted to those attendant upon international banking and financial transactions, while national banks are authorized to engage in more traditional domestic banking. 12 USC §§ 611, 24. Edge corporations were excluded from the definition of "bank" in the Bank Holding Act of 1956, while national banks were not. 12 USC § 1841(c).

Moreover, Edge corporations do not and were not created to perform the kinds of governmental functions

[4]And, to the extent that national banks and Edge corporations are similar, "[t]he substantial erosion of state tax immunity for national banks suggests that the similarities of a national bank to an Edge corporation should not be relied upon to grant the Edge corporation state tax immunity". Note, *A Constitutional And Statutory Analysis of State Taxation Of Edge Act Corporate Branches*, 51 Fordham Law Rev 991, 1015-1016 (1983).

which originally led to the designation of national banks as federal instrumentalities. National banks were originally empowered to issue currency and functioned as the monetary and fiscal agents of the United States. *First Agricultural National Bank,* 392 US at 355-56 (Marshall, J., dissenting). Edge corporations, however, were never more than federally chartered private international financial institutions whose self-interest was deemed to be coincident with the national interest.

In sum, Edge corporations are not so intimately connected with the government that they should be immune from state taxation as federal instrumentalities. States may, therefore, tax such corporations without the need for affirmative congressional consent.

B. Congress has created no tax immunity for out of state Edge corporation branches.

As demonstrated above, Edge corporations have no self-executing constitutional immunity from state taxation. Congress may nevertheless confer such immunity or tax exempt status by affirmative legislative action if it so chooses. *Oklahoma Tax Comm. v Texas Co.,* 336 US 342, 365 (1949). Such intent to immunize must, however, be clear and may not be assumed or implied. *Id.* at 366, quoting *Oklahoma Tax Comm. v United States,* 319 US 598, 604 (1943) and *Graves v New York ex rel. O'Keefe,* 306 US 466, 480 (1939). Appellant contends that Congress has immunized out of state Edge corporation branches by the enactment of 12 USC § 627. This view cannot be squared with either the statute's language or its legislative intent and history.

The statutory language itself is, of course, the primary source of legislative intent. *Howe v Smith,* 452 US 473, 480 (1981). If that language is unclear, then resort may be

had to legislative history. *Blum v Stenson,* 465 US 886, 896 (1984). In the instant case, there is no indication that Congress intended to create the tax loophole appellant would have this Court fashion.

Section 627, which has not been amended since its enactment in 1919, provides that:

> "Any corporation organized under the provisions of sections 611-631 of this title shall be subject to tax by the State within which its home office is located in the same manner and to the same extent as other corporations organized under the laws of that State which are transacting a similar character of business. The shares of stock in such corporation shall also be subject to tax as the personal property of the owners or holders thereof in the same manner and to the same extent as the shares of stock in similar State corporations."

By its very terms, which are permissive rather than prohibitive, the statute provides for nondiscriminatory taxation by an Edge corporation's home office state. The language simply does not address at all, and therefore does not preclude, taxation by other states having the requisite nexus to impose a tax. As one court has observed,

> "[Section 627] speaks of no tax immunity or special tax exemption for either the corporation or its shareholders as a consequence of incorporation under the Act. While the language selected expressly permits the domiciliary state to tax the corporation and to include shares of the corporation in the valuation of the personal property of the owner for taxing purposes, nothing in either sentence of § 627 restricts or forbids taxation by any other

> state. The provision does make clear that taxing state must treat Edge Act banks the same as it treats its own state banks."

City of Houston v Morgan Guaranty International Bank, 666 SW2d 524, 529-30 (Tex App 1983), *cert den,* 469 US 1213 (1985). This Court itself has recognized in passing that the essential purpose of the statute is to prohibit discrimination in favor of state-chartered banks. *See, First Federal Savings & Loan Assn. of Boston v. Tax Comm.,* 437 US 255, 258 & n 2 (1978).

As explained below, when examined in context, it is clear that the statute's reference to the "State within which [the Edge corporation's] home office is located" was merely descriptive of the only state which Congress believed would have a taxable nexus with an Edge corporation; the language was not all intended to confer by implication any tax immunity with respect to other states.

As part of the Edge Act, Congress enacted 12 USC § 615(b), which provides that an Edge corporation is empowered "[t]o establish and maintain for the transaction of its business branches or agencies in foreign countries, their dependencies or colonies, and in the dependencies or insular possessions of the United States, at such places as may be approved by the Board of Governors of the Federal Reserve System and under such rules and regulations as it may prescribe * * *". Pursuant to this statutory mandate, in 1920 the Federal Reserve Board issued Regulation K, which, *inter alia,* prohibited Edge corporations from establishing domestic branches, *See,* 12 CFR § 211.6(a) (1979).[5] In other words, prior to the 1979 regulatory

[5]The regulation read:

> "A Corporation may not establish any branch in the United States, but with prior Board approval may establish agencies in the United States for specific purposes, but not generally to carry on its business."

change discussed below, the Federal Reserve Board had interpreted 12 USC § 615(b) as precluding domestic branches by virtue of its specific authorization of only foreign branches. This limitation is consistent with the legislative history, which shows that Congress was concerned with the potential abuses associated with domestic branches and intended to prohibit them. *See,* 58 Cong Rec 7856-7857, 8100, 8102.

Thus, when 12 USC § 627 was enacted, and for many years thereafter, an Edge corporation had to be individually organized in any state in which it desired to do business. It is therefore illogical to construe section 627 as prohibiting by implication the taxation of branches whose establishment was never envisioned. On the contrary, by expressly authorizing taxation in the home office state, the statute allowed the only state with a legitimate claim to do so to subject Edge corporations to unrestricted, nondiscriminatory taxation. Again, the legislative history confirms that Congress intended Edge corporations to be fully taxable entities. *See,* 58 Cong Rec 4955, 4969.

Because of section 627 and because of the prohibition against domestic branches, until 1979 there was no question that all Edge corporations were fully taxable in the state in which they operated. In that year, the Federal Reserve Board, as part of its response to the general directive in section 3 of the International Banking Act (IBA) of 1978 (PL No. 95-369, 92 Stat 607) to minimize regulatory restrictions on the operation of Edge corporations, amended Regulation K to permit for the first time the establishment of domestic branches. *See,* 12 CFR § 211.4(c)(1)(1980).[6] This departure from its prior policy

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[6]In pertinent part, it read, "With prior Board approval, an Edge Corporation may establish branches in the United States * * *".

and interpretation of the original Edge Act[7] set in motion the events leading to the instant litigation. With the advent of domestic branching, Edge corporations, such as appellant, established such branches and began to contend that out of state branches could not be taxed because of the "home office" language in section 627.[8] It is respectfully submitted that the change in regulatory policy following the enactment of the IBA does not operate so as to create, as an unintended consequence, a heretofore nonexistent tax exemption.

Regardless of the validity of the Board's regulatory change, it remains that (1) Edge corporations are not federal instrumentalities taxable only with the affirmative consent of Congress, (2) 12 USC § 627 contains no express prohibition of the taxation of Edge corporations branches, and (3) Congress intended to make Edge corporations fully taxable. Thus, appellant's branch offices in New York, where they receive all the benefits and protections afforded by the state, may properly be assessed their fair share of taxes.

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[7]The IBA did not amend 12 USC § 615(b), the source of the domestic branch prohibition. The Federal Reserve Board's radical change in policy absent a specific legislative change does indeed, as appellant suggests, place in doubt the validity of the new regulation. This question need not, however, be resolved here.

[8]The IBA also did not amend 12 USC § 627.

CONCLUSION

Appellee's motion to dismiss or affirm should be granted on the ground that no substantial Federal question has been presented.

Dated: Albany, New York
July 15, 1987

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of
New York
Attorney for *Amicus Curiae*

O. PETER SHERWOOD
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

NANCY A. SPIEGEL
Assistant Attorney General

Of Counsel

No. 86-1857

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OCTOBER TERM, 1986

CONTINENTAL BANK INTERNATIONAL,

Appellant,

—against—

CITY OF NEW YORK,
DEPARTMENT OF FINANCE,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS FOR THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

EDWARD W. KEANE
Counsel for Appellant
125 Broad Street
New York, New York 10004
(212) 558-4000

WILLARD B. TAYLOR
H. RODGIN COHEN
THEODORE EDELMAN

SULLIVAN & CROMWELL
New York, New York

Of Counsel

July 22, 1987

Statement Pursuant to Rule 28.1

As noted in the Jurisdictional Statement (p. ii), appellant has moved for an order permitting it to file its Rule 28.1 listing under seal. Copies of the listing have heretofore been submitted to the Court for its *in camera* review.

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IN THE

Supreme Court of the United States

October Term, 1986

No. 86-1857

CONTINENTAL BANK INTERNATIONAL,

Appellant,

—against—

CITY OF NEW YORK, DEPARTMENT OF FINANCE,

Appellee.

APPELLANT'S REPLY BRIEF

Appellee does not deny, and the State of New York as *amicus curiae* forthrightly confirms, that this appeal raises federal questions of substantial public importance regarding the power of states and localities to tax all Edge Banks that operate branches or otherwise conduct business across state lines. Their sole contention is that these questions were correctly decided by the Court below. That contention, we submit, is without merit.

I.

Section 627 of the Edge Act Permits Taxation by the Home-Office State Only.

A.

Appellee and *amicus curiae* view Section 627 as a grotesque circumlocution: According to appellee, the statutory mandate that an Edge Bank "shall be subject to tax by the State within which its home office is located" means

"merely" that an Edge Bank can be taxed at "the place within the continental United States where an Edge [Bank] in 1919 could locate and, therefore, be subject to the state's taxing jurisdiction" (Motion 15).[1] Making the same contention, *amicus curiae* claims that the "home office" state "merely" means "the only state which Congress believed would have a taxable nexus with an Edge [Bank]" (*Amicus* 9).

Not only does this contention do violence to the statutory language, but it is wholly dependent on a single, demonstrably incorrect premise: that Congress intended to isolate each Edge Bank within a single state, forever disabled from either maintaining an office or conducting any business whatever across a state line.

Appellee itself undercuts that premise by acknowledging that Edge Banks have been authorized from the outset to operate domestic agencies (Motion 16). Such agencies would clearly have provided sufficient "nexus" to permit multistate taxation if Congress had deemed multistate taxation to be in the national interest. *See* the authorities cited in J.S. 15 n.11. By enacting Section 627, Congress expressed its view that the national interest would best be served by permitting an Edge Bank to be taxed only by its home-office state.

Section 627 on its face refutes the premise that Congress expected every Edge Bank to have only one office and to do business in only one state. The very reference to the "home" office shows that Congress contemplated that an Edge Bank might have multiple offices, and its reference

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[1] This and similar citations are to Appellee's Motion To Dismiss or Affirm. Citations to Appellant's Jurisdictional Statement and to the State of New York's *amicus curiae* brief are abbreviated "J.S." and "*Amicus*" respectively.

to the home-office "State" reflects Congress' understanding that such offices might be located in more than one state.

This conclusion is confirmed by the references to the "home office" elsewhere in the Edge Act. Section 613, for example, distinguishes between "the place in the United States where [an Edge Bank's] home office is to be located" and "the place or places where its operations are to be carried on." Like the Court below, appellee and *amicus curiae* ignore that crucial distinction.

As shown in the Jurisdictional Statement (J.S. 5, 14), the Edge Act's legislative history demonstrates that Congress expected—and indeed wanted—Edge Banks to operate across state lines. Like the Court below, appellee and *amicus curiae* ignore these expressions of congressional intent.

Undoubtedly responding to the wish of Congress, the FRB has always permitted Edge Banks to engage in interstate operations, at first through agencies and later through branches. In doing so, the Board recognized that Edge Banks "are not subject to federal law that limits the power of banks to establish branches across state lines." 65 Fed. Res. Bull. 546 (July 1979).

Appellee and *amicus curiae* assert that the FRB is simply wrong: "Congress," appellee insists, "intended to prohibit domestic branches" (Motion 16n.). Like the Court below [A2, A5],[2] appellee and *amicus curiae* claim that Section

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[2] Mysteriously, appellee says that "the Court below did not hold that branch offices were unlawful" (Motion 2). That statement is incorrect, for such a holding was the indispensable predicate for the Court's conclusion that Section 627 was not intended to prohibit taxation by a state in which an Edge Bank has a branch but not its home office [A2, A5]. *Amicus curiae* candidly acknowledges the conflict between its interpretation of Section 615(b)—which echoes that of the Court below—and the FRB's authorization of domestic branching (*Amicus* 11 n.7).

615(b)—which authorizes branches or agencies abroad with FRB permission—prohibits branches in the United States by some sort of negative implication (Motion 16; *Amicus* 9-10). If that were so, however, Section 615(b) would necessarily prohibit domestic agencies too, since it refers to "branches or agencies" without making any distinction between them. But the FRB has never construed Section 615(b) as a bar either to domestic agencies, which it has authorized since 1920, or to domestic branches, which it has authorized since 1979. The position of appellee and *amicus curiae*, therefore, is that for sixty-seven years the FRB has been consistently misinterpreting a statutory provision that the FRB itself drafted and that it is responsible for administering.[3]

The FRB's long-standing administrative interpretation, in which Congress has acquiesced, faithfully reflects the origi-

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[3] Appellee and *amicus curiae* incorrectly assert that in 1920 the FRB interpreted Section 615(b) as prohibiting domestic branches (Motion 8-9; *Amicus* 9-10). As noted above, Section 615(b) cannot be read as prohibiting branches but not agencies, yet the FRB has allowed agencies since March 1920. Clearly, therefore, the FRB prohibited domestic branches, not because of any statutory mandate, but in the exercise of its general regulatory powers. In promulgating the original Regulation K, the Board expressed its understanding that it has broad discretion to regulate Edge Banks:

> "Congress . . . has placed upon the [FRB] the responsibility of making such regulations and restrictions as may be necessary to insure the conservative and prudent management of [Edge Banks] and to safeguard as far as possible the interests of the public with whom they may do business. . . .
>
> ". . . The [FRB] . . . reserves the right from time to time to amend its regulations in such manner as experience and changing conditions may dictate." (6 Fed. Res. Bull. 379 (April 1920)).

In 1979, when it authorized domestic branches for the first time (Reg. K, § 211.4(c), June 14, 1979), the FRB acted without new express statutory authorization, obviously in the belief that such authorization was conferred by the original legislation.

nal congressional intent. When Congress enacted Section 627 it was well aware that the FRB was empowered to authorize Edge Banks to establish offices, and generally to do business, across state lines. Therefore, when Congress authorized taxation by the home-office state, it was unambiguously identifying the one specific jurisdiction, out of a number of potential jurisdictions, in which an Edge Bank would be subject to taxation. No other conclusion is consistent with the statutory language, the legislative history and the FRB's administrative interpretation.

B.

If Section 627 does not mean that the home-office state has the exclusive power of taxation, it has no apparent meaning whatever. It is unlikely, to say the least, that Congress would expressly empower the home-office states to tax Edge Banks if it intended that they be taxed by every state in which they do business. The Court below passed by this difficulty in discrete silence.

Appellee and *amicus curiae* struggle to attribute some cognizable meaning to Section 627 by suggesting that it "was intended only to prevent discriminatory taxation" (Motion 12; *Amicus* 9). They fail to explain, however, why Congress would prohibit tax discrimination only by the home-office state while permitting all other states to subject an Edge Bank to even the most grossly discriminatory taxation.

C.

Appellee and *amicus curiae* argue that "Section 627 contains no words of prohibition" (Motion 14; *Amicus* 8) and that authorizing the home-office state to tax "does not imply prohibition of taxation by other states" (Motion 21).

These contentions run afoul of the fact that this Court has repeatedly construed similar statutes as prohibiting all taxation that they did not expressly authorize. *E.g., Owensboro Nat'l Bank* v. *Owensboro,* 173 U.S. 664 (1899); *Bank of California* v. *Richardson,* 248 U.S. 476 (1919); *First Agricultural Nat'l Bank* v. *State Tax Comm'n,* 392 U.S. 339 (1968) (discussed in J.S. 10-12). All of the considerations that this Court found pertinent in those cases are present here, and dictate a similar result.

D.

Appellee's discussion of the legislative history is devoted wholly to irrelevancies.

First, the Senate debate, to which appellee devotes most of its attention (Motion 17-19), concerned taxation proposals materially different from what eventually became law. At the time of the Senate debate, the language now appearing in Section 627 had not yet been drafted. Since the Senate ultimately acquiesced in the House's view as to how Edge Banks should be taxed, the various impromptu comments on the Senate floor shed no light on the meaning of Section 627.[4]

Second, appellee makes brief reference to two taxation proposals considered and rejected by the House (Motion 19-20). Since the reasons for rejecting the two proposals are obscure, no conclusions can fairly be drawn from the bare fact that these proposals were rejected.

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[4] Not even the Senate, however, intended Edge Banks to be subject to general state taxation, for the bill it originally passed provided that they be taxed "the same as member banks of the Federal reserve system." 58 Cong. Rec. 5075 (1919). The national banks, to which this provision presumably referred, were then taxable only on their real estate. R.S. § 5219; *Bank of California* v. *Richardson, supra.*

Third, Representative Phelan's statement that Congress intended to prevent discriminatory taxation (Motion 20-21) proves nothing, for no one doubts that Section 627 prohibits tax discrimination by the home-office state. The question in dispute is whether the home-office state's power to tax an Edge Bank is exclusive. Representative Phelan did not address that question.

Appellee conspicuously ignores the extensive evidence, cited in the Jurisdictional Statement (J.S. 15-16), that the authors of Section 627 deliberately patterned that provision on the equivalent section of the National Bank Act (R.S. § 5219) and that they did so with specific advertence to this Court's decisions construing that earlier statute. The members of the House Banking and Currency Committee who drafted Section 627 were surely aware that only a few months earlier this Court had held Section 5219 to be "the exclusive rule governing state taxation" of national banks. *Bank of California* v. *Richardson, supra*, 248 U.S. at 483. Regardless of any differences of detail between Section 627 and R.S. § 5219, the inescapable conclusion is that the authors of Section 627 intended the two statutes to be given a similar construction: Both were to establish the "exclusive rule governing state taxation."

Appellee and *amicus curiae* understandably decline to defend the Court of Appeals' erroneous statement that the Congress that enacted Section 627 had "a mistaken notion that national banks were subject to State tax" [A6]. It was on that basis alone that the Court purported to justify its disregard of the most relevant portions of the legislative history.

E.

Appellee and *amicus curiae* both rely on a *dictum* of an intermediate appellate court in Texas in *City of Houston*

v. *Morgan Guaranty Int'l Bank,* 666 S.W.2d 524 (Texas Ct. App., 1st Dist. 1983), *cert. denied,* 469 U.S. 1213 (1985). The sole issue in that case, however, was whether, under the *second* sentence of Section 627, the *shares* of an Edge Bank are subject to taxation outside its home-office state. The Court specifically noted that "we are not concerned with a tax levied upon [the Edge Bank] as a corporation." *Id.* at 529. Because the second sentence of Section 627 permits an Edge Bank's *shares* to be taxed without reference to the home-office state, the issue in *Morgan Guaranty* was in no way similar to the issue in this case, and the Court's holding in no way supports the arguments advanced here by appellee and *amicus curiae.*

II.

Without Congressional Consent, State Taxation of Edge Banks Is Constitutionally Impermissible.

Appellee and *amicus curiae* make no attempt to explain why, if the Constitution permits the states to tax Edge Banks without the consent of Congress, Congress found it necessary to enact a statute permitting taxation by the home-office state. There is only one logical answer: Congress understood that under the long-established constitutional principle applicable to federally chartered banks, Edge Banks would not be subject to any state taxation whatever unless Congress gave its express consent. Indeed, this principle was specifically referred to during the debates on the Edge Bill. 58 Cong. Rec. 4955 (1919) (remarks of Senator Cummins).

Appellee and *amicus curiae* are unable to point to even one case in which this Court has ever held that a federally chartered bank can be taxed by the states without the

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express permission of Congress. Confronted with a long and unbroken line of contrary authority (J.S. 18), appellee can say only that all of these cases are somehow "obsolete" (Motion 23). Not only do appellee and *amicus curiae* fail to cite a single case—and we know of none—in which this Court has advanced such a suggestion, but they ignore the modern cases in which the Court has referred to the historic doctrine with unequivocal approval. *E.g., First Agricultural Nat'l Bank* v. *State Tax Comm'n, supra,* 392 U.S. at 340; *Department of Employment* v. *United States,* 385 U.S. 355, 360 (1966).

Failing to identify any constitutionally significant difference between Edge Banks and national banks, appellee and *amicus curiae* fall back on the startling assertion that Edge Banks are not "banks" at all, notwithstanding the fact that they have all the attributes of banks, including the power to receive deposits and to make commercial loans. *See* 12 U.S.C. § 615(a).

Appellee and *amicus curiae* purport to find significance in the fact that in statutory and regulatory parlance Edge Banks are sometimes referred to as "corporations" (Motion 31; *Amicus* 4 n.2). By similar reasoning one might argue that national banks are not "banks" either, because certain sections of the National Bank Act refer to them as "associations," including the section that long governed the power of state and local governments to tax national banks (R.S. § 5219 [F8]).

Appellee and *amicus curiae* do not even try to explain how, if an Edge Bank is not a "bank," it is nonetheless claimed to be subject to taxation under a statute that by its terms is applicable only to a "banking corporation," defined as an entity doing a "banking business" [F8-F9].

Appellee and *amicus curiae* ignore the numerous references to the national banks in the legislative history, including the proponents' revealing statement that the Edge Act was intended to be "a new national banking act for banks specializing in foreign trade." 58 Cong. Rec. 7855 (1919). Clearly Congress viewed Edge Banks as specialized national banks, and none of the differences between the two can be regarded as having constitutional significance (see J.S. 19-20).

In sum, there is no principled way that Edge Banks can be denied the benefit of the constitutional rule that this Court has long held applicable to every other type of federally chartered bank.

Conclusion

Appellee's motion should be denied. The decision below is in error, and this appeal presents federal questions that are both substantial and of public importance.

Respectfully submitted,

EDWARD W. KEANE
Counsel for Appellant
125 Broad Street
New York, New York 10004
(212) 558-4000

WILLARD B. TAYLOR
H. RODGIN COHEN
THEODORE EDELMAN

SULLIVAN & CROMWELL
Of Counsel

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No. 86-1857

In the Supreme Court of the United States

OCTOBER TERM, 1987

CONTINENTAL BANK INTERNATIONAL, APPELLANT

v.

CITY OF NEW YORK, DEPARTMENT OF FINANCE

ON APPEAL FROM THE COURT OF APPEALS FOR THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
JAMES M. SPEARS
Deputy Assistant Attorney General
ANTHONY J. STEINMEYER
RICHARD A. OLDERMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether state and local taxes may be imposed on branches of out-of-state corporations that are organized under the Edge Act, 12 U.S.C. 611-632.

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CONTINENTAL BANK INTERNATIONAL, APPELLANT

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CITY OF NEW YORK, DEPARTMENT OF FINANCE

ON APPEAL FROM THE COURT OF APPEALS FOR THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Edge Act (the Act), 12 U.S.C. 611-632, enacted in 1919, permits the creation of federally-chartered corporations to engage in "international or foreign banking or other international or foreign financial operations" (12 U.S.C. 611). These so-called "Edge corporations" are authorized to discount notes, make loans, accept deposits, and engage in a range of other banking functions (see 12 U.S.C. 615(a)), although their activities must be "incidental to [their] international or foreign business" (12 U.S.C. 616). The Act also provides, in Section 615(b), that Edge corporations may "establish and maintain for the transaction of [their] business branches or agencies in foreign countries, their dependencies or colonies, and in the

dependencies or insular possessions of the United States, at such places as may be approved by the Board of Governors of the Federal Reserve System [the Board]." Pursuant to this provision, the Board in 1920 promulgated its Regulation K, which in its original form permitted an Edge corporation to establish "[a]gencies * * * in the United States * * * for specific purposes, but not generally to carry on the business of the Corporation" (§ VIII (Mar. 23, 1920)); at the same time, Regulation K barred Edge corporations from establishing *branches* in the United States. See 12 C.F.R. 211.6(a) (1978).

In 1978, Congress enacted the International Banking Act (IBA), Pub. L. No. 95-369, 92 Stat. 607, which made several amendments to the Edge Act. Among other things, Section 3 of the IBA, 92 Stat. 608, directed the Board to revise its Edge Act regulations to eliminate or modify those provisions that unnecessarily disadvantaged Edge corporations. In response to this mandate, the Board revised its Regulation K to eliminate the bar on domestic branching by Edge corporations. In its current form, Regulation K provides that "Edge Corporation[s] may establish branches in the United States" with the Board's approval. 12 C.F.R. 211.4(c).

From the time of its enactment, the Edge Act has also contained a provision permitting state taxation of Edge corporations. The first sentence of Section 627 of the Act provides that an Edge corporation "shall be subject to tax by the State within which its home office is located in the same manner and to the same extent as other corporations organized under the laws of that State which are transacting a similar character of business." The second sentence of the provision makes the shares of stock of Edge corporations taxable as personal property of the shareholders. Section 627 was not modified by the 1978 amendments and remains in effect.

2. Prior to 1980, during the period when Regulation K barred branching by Edge Corporations, the Continental Illinois National Bank and Trust Company of Chicago (Continental Illinois) owned three separately incorporated Edge corporations that were domiciled in New York, Florida, and Texas. During this period, Continental Illinois' New York Edge corporation paid taxes to New York City pursuant to the City's Financial Corporation Tax, which imposes an annual levy on every "banking corporation" doing business in the City. See § R46-37.1 of the Administrative Code of the City of New York, now codified at §§ 11-368 *et seq.* Following the revision of Regulation K, however, Continental Illinois dissolved its separate Edge corporations and incorporated appellant, Continental Bank International, as an Edge corporation with its home office in Illinois. Appellant, in turn, established branches in various locations around the country, including New York City. J.S. App. C2-C3. Appellant then maintained that it could not be subject to the New York City tax because, it asserted, under 12 U.S.C. 627 an Edge corporation may be taxed only by the state in which it maintains its home office. When City authorities rejected this contention (J.S. App. C1-C17), appellant paid the tax under protest and sought judicial relief (see *id.* at A4).

The Appellate Division of the New York State Supreme Court upheld the City's authority to tax appellant (J.S. App. B1-B2), and that determination was in turn affirmed by the New York State Court of Appeals (*id.* at A1-A10). The Court of Appeals first found that the language of Section 627 contains "no plain authorization or prohibition of taxation by States of [Edge corporation] branch offices" (J.S. App. A5). With this in mind, the court then determined (*id.* at A5-A6) that,

> [i]nasmuch as the statutory scheme of the Edge Act did not authorize branch offices in the United States

> (*see*, 12 USC § 615[b]) and the possibility of such offices was decried by some of the original enactors (58 Cong Rec 7856-7857), it stands to reason that the authorization of full nondiscriminatory taxation by the home office State (12 USC § 627) was not an expression of immunity for then nonexistent branch offices. Instead, Congressional debate indicated a purpose to subject Edge Act banks to State taxation (58 Cong Rec 4969).

The court therefore concluded that "an intention of Congress to deny the State's power to tax Edge Act bank branches cannot be inferred from the language of the statute, which is at best ambiguous on that subject, or from the surrounding debates which indicate only an intent to subject Edge Act banks to State taxation" (*id.* at A6).

The Court of Appeals next held that Edge corporations are not constitutionally immune from state taxation as federal instrumentalities. On this, the court first found it unclear whether national banks retain their status as federal instrumentalities, and the court therefore labeled "problematic" the argument "that Edge Act banks are Federal instrumentalities because they are analogous to national banks" (J.S. App. A7). Instead, the court grounded its decision on the nature of Edge corporations, finding that "Edge Act banks receive no financial assistance from the Federal Government. The Federal Government does not rely on Edge Act banks to perform a traditionally governmental act. Rather, the Government relies upon the banks' separate profit motivation which propels the banks toward a mutually satisfactory end." *Id.* at A9 (citations omitted). For these reasons, the court concluded that Edge corporations and their branches are not constitutionally immune from state taxation in the absence of express congressional authorization.

DISCUSSION

There are two questions in this case: whether Edge corporations are federal instrumentalities that are immune from state taxation in the absence of express congressional authorization and, if not, whether Section 627 nevertheless precludes the taxation of an Edge corporation by states other than the one in which the corporation's home office is located. Because the court below answered both of these questions correctly, plenary review of this case is unnecessary.

1. We think it clear that Edge corporations are not federal instrumentalities that are immune from state taxation under the Supremacy Clause. Such a tax immunity is appropriate only "when the [state] levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *United States* v. *New Mexico*, 455 U.S. 720, 735 (1982). As Justice Marshall has explained, the Court has looked at a variety of factors to determine whether an instrumentality meets this test:

> whether it is organized for private profit, and whether the Government has retained such control over it that "it could properly be called a 'servant' of the United States in agency terms"; whether it was organized to effectuate a special governmental program; whether its ownership, substantially or totally, lies in the Government; whether government officials handle and control its operations; whether its officers or any significant portion of them are appointed by the Government; whether the Government gives it significant financial aid, whether it is charged by law with carrying out some of the Government's international

> commitments, and whether it performs "functions indispensable to the workings" of a governmental unit.

First Agricultural Nat'l Bank v. *State Tax Comm'n*, 392 U.S. 339, 353-354 (1968) (citations omitted) (Marshall, J., dissenting).

Edge corporations have virtually none of these characteristics. As the drafters of the Edge Act emphasized, Edge corporations are private entities (see 58 Cong. Rec. 8083 (1919) (remarks of Rep. Phelan); *id.* at 8089 (remarks of Rep. Wingo); 59 Cong. Rec. 51, 52 (1919) (remarks of Rep. Wingo); *id.* at 52 (remarks of Rep. Platt)); they are given federal charters simply to make them more competitive abroad and to facilitate oversight by the Federal Reserve Board. See S. Rep. 108, 66th Cong., 1st Sess. 2 (1919); 58 Cong. Rec. 8083 (1919) (remarks of Rep. Phelan); *id.* at 8084, 8086 (remarks of Rep. Platt).[1] While Edge corporations are of course subject to federal regulation, they operate for profit under the direction of private officers. They receive no federal financial assistance, and the government is not liable for their obligations. And Edge corporations do not satisfy national treaty obligations or perform other uniquely governmental functions. Compare *Department of Employment* v. *United States*, 385 U.S. 355, 359 (1966); *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 484-485 (1942). Such entities can hardly be regarded as instrumentalities that are "virtually * * * an

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[1] In any event, the simple fact that an institution is chartered by the federal government does not make it a federal instrumentality. See, *e.g.*, *Railroad Co.* v. *Peniston*, 85 U.S. (18 Wall.) 5 (1873). "Similarly, a whole host of businesses and institutions are subject to extensive federal regulation and that has never been thought to bring them within the scope of the 'federal instrumentalities' doctrine." *First Agricultural Nat'l Bank*, 392 U.S. at 354-355 (Marshall, J., dissenting).

arm of the Government." *Department of Employment*, 385 U.S. at 359-360 (footnote omitted).

Appellant makes no serious attempt to demonstrate that Edge corporations satisfy the tax immunity test set out in *United States* v. *New Mexico, supra*. Instead, it argues (J.S. 18-20) that such corporations should be deemed federal instrumentalities by analogy to national banks, which the Court long ago held to be instrumentalities that (at least in some respects) are immune from state taxation. See, *e.g.*, *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Owensboro Nat'l Bank* v. *Owensboro*, 173 U.S. 664 (1899). In fact, however, it is far from clear that national banks retain the characteristics that led the Court during the last century to hold them immune from state taxation. The Second Bank of the United States, whose operations were at issue in *M'Culloch*, was in part owned and directed by the United States and acted as the fiscal agent of the federal government; the national banks at issue in *Owensboro* acted as the agents for issuance of federal currency. See *First Agricultural Nat'l Bank*, 392 U.S. at 355-356 (Marshall, J., dissenting). Today, in contrast, it is the Federal Reserve banks—not the privately-owned national banks—that issue currency and serve as the federal government's fiscal agent. See *id.* at 356-358 (Marshall, J., dissenting).

For this reason, the last time that the Court was presented with the issue it expressly did not decide "the constitutional question of whether today national banks should be considered nontaxable as federal instrumentalities." *First Agricultural Nat'l Bank*, 392 U.S. at 341. And the three Justices who addressed the issue concluded flatly "that in light of the present functions and role of national banks they should not in this day and age be considered constitutionally immune from nondiscriminatory state taxation" (*id.* at 349 (Marshall, J., dissenting)).

There accordingly is some force to the Court of Appeals' conclusion that appellant's argument by analogy to national banks is "problematic" (J.S. App. A7).[2]

In any event, even if precedent would compel the Court to conclude today that national banks should be treated as federal instrumentalities, that rule should not be extended to Edge corporations. Those corporations are not national banks; if they were, they would have no general right to branch across state lines at all. See 12 U.S.C. 36. And the drafters of the Edge Act recognized that Edge corporations were less "governmental" in nature than the national banks of that era. See, *e.g.*, 58 Cong. Rec. 8083 (1919) (remarks of Rep. Phelan); *id.* at 8089 (remarks of Rep. Wingo). In these circumstances, there is no reason for the Court to depart from current tax immunity doctrine by

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[2] The Court held in *First Agricultural Nat'l Bank* that 12 U.S.C. (1964 ed.) 548, which expressly permitted certain limited state taxes on national banks, "was intended to provide the only ways in which States can tax national banks" (392 U.S. at 343); the Court concluded from the provision's legislative history "that if a change is to be made in state taxation of national banks, it must come from the Congress, which established the present limits" (*id.* at 346). Congress made that change the following year, providing that, "[f]or the purposes of any tax law enacted under authority of * * * any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." 12 U.S.C. 548. In making this change, the Senate committee observed that "[t]here may at one time have been justification for giving national banks privileges and immunities which were denied State banks, under the theory that national banks are peculiarly an instrumentality of the Federal Government * * *. Without specifically addressing the question whether national banks remain, in substance, such a Federal instrumentality, the committee is agreed that there is no longer any justification for Congress continuing to grant national banks immunities from State taxation which are not afforded State banks." S. Rep. 91-530, 91st Cong., 1st Sess. 2 (1969).

granting the benefits of federal instrumentality status to private entities that plainly have not been " 'incorporated into the government structure' " (*New Mexico*, 455 U.S at 737 (citation omitted)).

2. This leaves the second, and in our view more difficult, question here: whether Section 627, whose first sentence provides that an Edge corporation "shall be subject to tax by the State within which its home office is located," precludes taxation by states *other* than the one in which the corporation is domiciled. This language, which is permissive—and which does not in terms permit taxation *only* by the home office state—does not squarely resolve the question. And the legislative history of Section 627 is in important respects painfully opaque. On balance, however, we think that the congressional intent, when read against the background of other provisions of the statute, indicates that the court below ruled correctly in holding that Section 627 does not have a preclusive effect.

a. As originally introduced in the Senate, the Edge Act did not contain a provision providing for state taxation of Edge corporations. In explaining this omission, the Act's principal sponsor, Senator Edge, explained: "I thought and lawyers feel, many of them at least, that a corporation organized under this act would be taxed in every way that any other similar corporation is taxed if there is nothing said to the contrary. In other words, we define it when we exempt, and when we do not define it they are not exempted." 58 Cong. Rec. 4969 (1919). See *id.* at 4955 (remarks of Sen. Edge). Other senators agreed that "if nothing is said about it, under the ordinary operation of the tax laws, the tax that [Edge corporations] ought to pay will be imposed by laws already existing" (*id.* at 4969 (remarks of Sen. Smith)). See *ibid.* (remarks of Sen. Norris); *ibid.* (remarks of Sen. Smoot).[3] Senator Edge

[3] At least one Senator did suggest that Edge corporations might be immune from state taxation as federal instrumentalities. See 58 Cong.

nevertheless acquiesced in the addition of a proposed amendment addressing the taxation question, stating that "we want to make it doubly sure, and inasmuch as no one wants [Edge corporations] to escape any taxation, State or Federal, I am entirely satisfied to have language inserted to make it clear" (*ibid.*). See *id.* at 4955 (remarks of Sen. Edge); *id.* at 4969 (remarks of Sen. Smoot). This amendment was thus intended "to draw specific attention" to the taxability of Edge corporations (*id.* at 4956 (remarks of Sen. Edge)).

As originally proposed by Senator Gronna, this amendment, the predecessor to Section 627, provided in terms only for the imposition of federal taxes upon Edge corporations. This language prompted a general objection

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Rec. 4969 (1919) (remarks of Sen. Smith). Senator Edge, however, expressly and firmly rejected the suggestion that Edge corporations would be immune from state taxation as "fiscal agent[s] of the Government" (*id.* at 4955 (colloquy between Sens. Edge and Cummins)). Indeed, it was unclear to a roughly contemporaneous Congress whether the immunity even of national banks from state taxation rested on constitutional grounds rather than on preemptive legislative action:

> There are three possible theories of the relation of Congress to State taxation of national banks or shares therein: (1) That the plenary power of the State to tax may be restricted by Congress in order to protect an agency of the Federal Government from taxation deemed hostile or injurious; (2) that the powers of State and Nation are concurrent and that Congress may therefore restrict the State in virtue of Federal supremacy; and (3) that the State has no power except such as has been delegated by Congress. The committee does not deem it necessary to discuss the relative merits of these theories.

S. Rep. 986, 67th Cong., 4th Sess. 3 (1922). It appears that only one Senator expressed serious reservations about the imposition of state taxes on Edge corporations. See 58 Cong. Rec. 4969 (1919) (remarks of Sen. Owen); cf. *ibid.* (colloquy between Sens. Smith and Norris).

that the corporations were also to be subject to state taxation. See 58 Cong. Rec. 4969 (1919) (colloquy between Sens. Norris and Gronna); *ibid.* (remarks of Sen. Smoot); *ibid.* (remarks of Sen. Norris); *ibid.* (remarks of Sen. Gronna). The amendment accordingly was itself amended to make Edge corporations taxable "the same as member banks of the Federal Reserve System" (*ibid.*). This language was seen as desirable on the view that Edge corporations "ought to be taxed like any other banks. There ought to be no exemption about it. If they are located in New York they get the protection of the laws of New York, and they ought to be required to pay a tax to the State of New York the same as any other corporation doing business in that State" (*ibid.* (remarks of Sen. Norris)).[4] The amendment passed the Senate in this form (*id.* at 5075).[5]

When the Edge Act passed to the House for consideration, the Federal Reserve Board objected to what it regarded as the ambiguous language of the Gronna amendment. The Board noted that "member banks" may be either state or national banks, which at the time were subject to different degrees of state taxation (see n.4, *supra*);

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[4] There was some confusion expressed on the Senate floor about the nature of the state taxes imposed on member banks. State-chartered banks that were members of the Federal Reserve system were of course fully taxed; national member banks were taxed only to the extent permitted by Congress. See *Bank of California* v. *Richardson*, 248 U.S. 476, 483 (1919); p. 7, *supra*. When the amendment was adopted, however, it plainly was the Senate's understanding that "[a]ll member banks are taxed under the State laws." 58 Cong. Rec. 4969 (1919) (remarks of Sen. Norris); see *ibid.* (remarks of Sen. Gronna).

[5] Prior to passage, Senator Gronna proposed yet another modification that would have made express reference to state tax laws; this amendment was passed over and was never put to a vote. See 58 Cong. Rec. 4969 (1919).

the Board therefore proposed making Edge corporations taxable "to the same extent as national banking associations." *Hearing on S. 2472 Before the House Comm. on Banking and Currency*, 66th Cong., 1st Sess. 105 (1919) (statement of George L. Harrison). Without explanation, however, the House Committee on Banking and Currency discarded both the Senate and Board versions, substituting the current language of Section 627, along with a proviso to the statute's second sentence stating that shares of Edge corporation stock "owned by nonresidents of any State" would be taxable "only in the city or town in which the corporation's home office is located, and not elsewhere." 58 Cong. Rec. 7854, 8107 (1919).

Although the House debate on this amendment has elements of ambiguity, it apparently was directed only at the desirability of the nonresident share proviso. See 58 Cong. Rec. 8107-8108 (1919).[6] The House ultimately

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[6] Most of the House debate clearly concerned only the proviso. Appellant relies (J.S. 15-16) in large part on a statement made by Representative Wingo that "[t]he Supreme Court of the United States and the different courts have interpreted this language. It is copied verbatim from the national banking act. In other words, we are going to make these [Edge] corporations and their stock to be taxed exactly in the same manner as national banks and their stock are taxed" (58 Cong. Rec. 8108 (1919)). Appellant reads Representative Wingo's remark to mean that Section 627 was modeled on Rev. Stat. § 5219 (1875 ed.) (formerly codified at 12 U.S.C. (1964 ed.) 548), a provision of the National Bank Act that set out the exclusive means by which states could tax national banks. But even that remark was probably directed only at the proviso; the general context in which it was made related to the proviso only, and it was the proviso—not the other portion of the House amendment that became Section 627—that was borrowed virtually verbatim from Rev. Stat. § 5219 (which provided that "the shares of any national banking association owned by nonresidents of any State shall be taxed in the city or town where the bank

passed the amendment, including the nonresident share proviso. In conference, however, the proviso was dropped at the request of the Senate conferees. See H.R. Conf. Rep. 473, 66th Cong., 1st Sess. 3 (1919); 59 Cong. Rec. 49 (1919). The rest of the House amendment was approved by the Senate without objection and was enacted as Section 627.

b. The argument that Section 627's express authorization of taxation by the home office state precludes taxation by other states would obviously be strengthened by evidence that the drafters of the Act expected Edge corporations to conduct interstate operations. There is only scant evidence of this, however. To the contrary, Section 615(b) authorizes Edge corporations to maintain "branches or agencies in foreign countries, their dependencies or colonies, and in the dependencies or insular possessions of the United States," and this provision plainly could have been read as prohibiting, by negative implication, the operation of agencies or branches in the United States. Again, however, the legislative history leaves some doubt about Congress's expectations.

Section 615(b) was introduced in its current form by Senator Edge and passed the Senate without discussion; it was described simply as a provision allowing Edge cor-

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is located, and not elsewhere)." Conversely, Representative Phelan stated in debate that "we want to place corporations organized under the national banking law on the same footing as corporations organized under the State laws. * * * This section was intended to prevent discrimination by the States in the taxation of a corporation organized under this law." 58 Cong. Rec. 8083 (1919). This statement, which suggests that Edge corporations should be treated like state-chartered corporations for tax purposes, seemingly cuts against appellant's argument that Edge corporations should be relieved from most state taxation. Again, however, the context of the debate suggests that Representative Phelan may have been referring only to the taxation of shareholders.

porations " 'to establish branches in foreign countries.' " S. Rep. 108, *supra*, at 2 (quoting letter from Federal Reserve Board).[7] When the bill passed to the House, the Banking and Currency Committee proposed amending Section 615(b) to allow the establishment by Edge corporations of "*agencies in the United States and* branches or agencies in foreign countries." 58 Cong. Rec. 7854, 7856 (1919) (emphasis added). This version of the bill was debated in the House, where Representative Platt, chairman of the Banking and Currency Committee and floor manager of the bill, insisted repeatedly that it did not allow the operation of domestic branches by Edge corporations. See *id.* at 7856 (colloquy between Reps. Haugen and Platt); *ibid.* (remarks of Rep. Platt); *id.* at 7857, 8100 (remarks of Rep. Platt). Indeed, Representative Platt opposed an amendment that would have expressly prohibited domestic branching "because there is no authorization for branch banks in there. We have provided that branches shall only be established in foreign countries, and I do not see any reason to put anything else in." *Id.* at 7857.[8] See *id.* at 8100 (remarks of Rep. McFadden).

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[7] A predecessor bill would have permitted a proposed Foreign Finance Corporation to establish "branches or agencies in any city or cities of the United States or any foreign country." *Hearings on S. 2472 Before the Senate Comm. on Banking and Currency,* 66th Cong., 1st Sess. 27 (1919). This suggests that the omission of similar language from the Edge Act was intentional.

[8] It was when the bill was in this form—expressly permitting the operation of domestic agencies—that Representative Platt made the remark, relied upon by appellant (J.S. 14), that

> If the gentleman is going to have people in Iowa properly served by these banks, they would want an agency there.
>
> * * * * *
>
> * * * That is not a branch, and these are not banks. If the gentleman does not want his people properly served by a local

Despite these comments, the House committee version of Section 615(b) was amended on the floor to provide expressly that Edge corporations could establish "agencies *but not branches* in the United States and branches or agencies in foreign countries" (58 Cong. Rec. 8102 (1919) (emphasis added)). See *ibid.* (remarks of Rep. Cannon); *ibid.* (remarks of Rep. Platt). The language added to the Senate version of Section 615(b) both by the House committee and on the House floor was deleted in conference, however; the Senate conferees noted that the House amendments "provided that these banking corporations might establish agencies in the United States. The Senate committee objected to that, and the House receded." 59 Cong. Rec. 111 (1919).

In explaining this change to the House, Representative Platt observed that "[t]here was a good deal of discussion as to whether an agency and a branch were the same thing, and we finally struck it out, although personally I think institutions of this kind should be allowed not only agencies but branches. * * * But the matter seemed not of great enough importance to insist upon, and we yielded." 59 Cong. Rec. 49 (1919). In response to a question, however, Representative Platt added that the deletion of the House language "will put [Edge corporations] on the same basis with national banks. National banks do have correspondents, and I suppose the law would be construed in the same way, probably." *Ibid.* When asked whether "[t]hat will give [Edge corporations] practically agencies to do whatever business they want to do outside of their own

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agency they would have to go to New York every time they did business. * * * These financial institutions either are to have agencies or else his people will have to go to Wall Street everytime they do business with them.

58 Cong. Rec. 7857 (1919).

cities, will it not?" (*ibid.* (remarks of Rep. Hicks)), Representative Platt responded: "Very likely. We have simply stricken out all reference to it, on account of the disagreement as to the terms that were used." *Ibid.*

Given the clear congressional opposition to domestic branching by Edge corporations—as well as the fact that Section 615(b) as adopted treats branches and agencies alike—Representative Platt's statement to the House that Edge corporations "[v]ery likely" would be permitted to operate agencies seems inconsistent with the Senate's action in striking the House language (expressly authorizing domestic agencies) from the bill. As explained by Representative Platt, however, the Senate conferees seem to have been primarily concerned that Edge corporations might establish branches in the guise of agencies. He therefore concluded that there was no objection to Edge corporations operating in the same manner as national banks. At the time, those banks were not permitted to branch at all. But the restriction on branching did not prevent the creation by a bank of " 'a mere agency for the transaction of a particular business,' " as opposed to " 'a branch bank wherein is carried on a general banking business.' " *Clarke* v. *Securities Industry Ass'n,* No. 85-971 (Jan. 14, 1987), slip op. 16 (quoting *Lowry Nat'l Bank,* 29 Op. Att'y Gen. 81, 87 (1911)). See *First Nat'l Bank* v. *Missouri,* 263 U.S. 640, 658 (1924); *Merchants' Bank* v. *State Bank,* 77 U.S. (10 Wall.) 604, 651 (1870). The best guess is that it was on Representative Platt's understanding that the House passed the bill as modified in conference. It is hard to make any guess at all as to the Senate's expectations.

c. In our view, the fairest reading of this history is that Section 627 should not be interpreted to preclude taxation of out-of-home-state Edge corporation offices by the states in which those offices are located. The only discus-

sion of the desirable scope of state taxation took place in the Senate, where there was general agreement (expressed most notably by Senator Edge himself) that Edge corporations should "be taxed in every way that any other similar corporation is taxed" (58 Cong. Rec. 4969 (1919) (remarks of Sen. Edge)). Senator Edge and many of his colleagues were also of the view that Edge corporations would be subject to full state taxation in the absence of any contrary statement. The Senate version of Section 627 accordingly was added simply "to make it doubly sure, * * * inasmuch as no one wants [Edge corporations] to excape any taxation, State or Federal" (58 Cong. Reg. 4969 (1919) (remarks of Sen. Edge)). It is true, as appellant observes (J.S. 17), that the Senate version was replaced by a House substitute containing the "home office" state language. But the Senate conferees—while objecting to a portion of the House amendment dealing with taxation of nonresident shares—accepted the House substitute without complaint. This action suggests that the House amendment was not perceived to alter the basic effect of the Senate version.

Given this history, Section 627 seemingly was intended only to insure that Edge corporations would be subject to some state tax in the event that they were otherwise held immune from state taxation under the Supremacy Clause. Since, as we explain above, Edge corporations have no such constitutional immunity, appellant is correct in noting (J.S. 10) that this reading of Section 627 renders the provision largely superfluous. But that would not have surprised the enacting Congress: Senator Edge himself was of the view that Section 627 was unnecessary to permit state taxation, and he agreed to the provision's enactment simply "to make it doubly sure."

When Section 627 was enacted, Congress plainly did not have in mind extensive interstate operations by Edge corporations. It firmly rejected the prospect of domestic branching by those corporations.[9] And while there is some evidence that Congress anticipated the creation of Edge corporation agencies (an activity that was in fact authorized by the Board in the 1920 version of Regulation K), Representative Platt—himself an advocate of branching by Edge corporations—concluded that "the matter seemed not of great enough importance to insist upon" (59 Cong. Rec. 49 (1919)).

Against this background, it appears that Congress made Edge corporations "subject to tax by the State[s] within which [their] home office[s] [are] located" (12 U.S.C. 627) simply to insure that those corporations would be taxable by *some* state in the event that the courts found a constitu-

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[9] Contrary to appellant's suggestion (J.S. 9), this observation does not mean—and the court below did not hold—that the Board acted beyond its statutory authority when it modified Regulation K to permit branching by Edge corporations after the enactment of the IBA in 1978. Section 3(a) of the IBA directed the Board to eliminate regulatory provisions that "disadvantage[d] or unnecessarily restrict[ed] or limit[ed] [Edge] corporations"; Section 3(b) expressed a congressional intent to give Edge corporations "powers sufficiently broad to enable them to compete effectively with similar foreign-owned institutions in the United States and abroad." 92 Stat. 608. At the same time, Section 4 expressly permitted foreign banks to establish branches in the United States. 92 Stat. 612. Whether this enactment authorized the Board to permit domestic branching by Edge corporations is not at issue in this case, but the argument that Congress in 1919 did not anticipate extensive interstate operations by Edge corporations does not imply that the Board is not now authorized to permit domestic branching. See Kelly, *Edge Act Corporations After the International Banking Act and New Regulation K: Implications for Foreign and Regional or Smaller Banks*, 20 Va. J. Int'l L. 37, 45 (1979).

tional immunity. Because Congress did not envision extensive multi-state operations by Edge corporations, that reference to a single state need not be read as indicating an intention to foreclose other constitutionally permissible state taxes. While Congress's choice of language does not leave the matter entirely free from doubt, on balance we believe that the Court of Appeals gave the best answer to the question here.[10]

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[10] We note that appellant's reading of Section 627 might lead to the conclusion that the income of Edge corporation branches located outside the home office state could not be taxed by *any* state—including the one in which the home office is located. It is doubtful that Section 627 can authorize home state taxation to an extent not permitted by the Due Process Clause of the Fourteenth Amendment. But the Court has made it clear that the Clause "imposes two requirements for such state taxation: a 'minimal connection' or 'nexus' between the interstate activities and the taxing State, and 'a rational relationship between the income attributed to the State and the intrastate values of the enterprise.' " *Exxon Corp.* v. *Department of Revenue,* 447 U.S. 207, 219-220 (1980) (quoting *Mobil Oil Corp.* v. *Commissioner of Taxes,* 445 U.S. 425, 436, 437 (1980)). Even if the Edge corporation and its branches are a unitary business—so that corporate income from all sources, wherever located, may be taken into account in determining the income that may fairly be apportioned to the taxing state—"the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated." *Container Corp. of America* v. *Franchise Tax Board,* 463 U.S. 159, 169 (1983). The Court thus "will strike down the application of an apportionment formula if the taxpayer can prove 'by "clear and cogent evidence" that the income attributed to the State is in fact "out of all appropriate proportions to the business transacted . . . in that State" ' " (*id.* at 170 (citations omitted)). And in setting down these rules, the Court has not insisted that the taxpayer demonstrate the existence of actual dual taxation. It therefore is not clear that the due process "nexus" and "rational relationship" requirements should be deemed satisfied, and that income from all geographical sources accordingly should be subject to tax by the home office state, simply because congressional action precludes any taxation by other states.

CONCLUSION

The motion of appellee to dismiss or affirm should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
JAMES M. SPEARS
Deputy Assistant Attorney General
ANTHONY J. STEINMEYER
RICHARD A. OLDERMAN
Attorneys

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No. 86-1857

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CONTINENTAL BANK INTERNATIONAL,

Appellant,

—against—

CITY OF NEW YORK,
DEPARTMENT OF FINANCE,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS FOR THE STATE OF NEW YORK

APPELLANT'S SUPPLEMENTAL BRIEF IN RESPONSE TO VIEWS OF THE UNITED STATES

EDWARD W. KEANE
Counsel for Appellant
125 Broad Street
New York, New York 10004
(212) 558-4000

WILLARD B. TAYLOR
H. RODGIN COHEN
THEODORE EDELMAN
SULLIVAN & CROMWELL
New York, New York
Of Counsel

May 3, 1988

Amended Statement Pursuant to Rule 28.1

Appellant has moved for an order permitting its Amended Rule 28.1 listing to be filed under seal. Copies of the listing are herewith submitted to the Court for its *in camera* review.

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IN THE

Supreme Court of the United States

October Term, 1987

No. 86-1857

CONTINENTAL BANK INTERNATIONAL,

Appellant,

—against—

CITY OF NEW YORK, DEPARTMENT OF FINANCE,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS FOR THE STATE OF NEW YORK

APPELLANT'S SUPPLEMENTAL BRIEF IN RESPONSE TO VIEWS OF THE UNITED STATES

Relying on our prior submissions for all else, we limit this response to new matters raised by the Solicitor General in his brief for the United States.

I.

Section 627 is not contingent legislation and is not "superfluous."

Implicitly rejecting positions taken by appellee and the Court below, the Solicitor General struggles to escape the plain meaning of Section 627 by conjuring up a theory of breathtaking novelty: Section 627, he argues, "seemingly was intended only to insure that Edge [Banks] would be subject to some state tax in the event that they were other-

wise held immune from state taxation under the Supremacy Clause" (S.G. Br. 17, 18). Contending that Edge Banks should not be held "immune from state taxation" under present-day doctrine, he frankly acknowledges that "this reading of Section 627 renders the provision largely superfluous" (*id.* at 17).

1. Understandably, the Solicitor General makes no attempt to show that his view is supported by—or is even consistent with—the statutory language. Section 627 is written in declaratory, unconditional and unqualified terms: An Edge Bank "shall be subject to tax by the State within which its home office is located." Such terms negate any notion that Section 627 is either contingent or "superfluous."

The Solicitor General suggests no reason why Section 627 should not be read in harmony with equivalent provisions of earlier federal banking statutes (*e.g.*, R.S. § 5219), which, without exception, permitted only minimal state taxes and implicitly precluded all others, as this Court had repeatedly held (*see* J.S. 17-18). This Court had considered those statutes in numerous cases without once intimating that their effect was contingent or that they constituted mere surplusage.

2. The Solicitor General's theory rests on a misconception of the "constitutional immunity" doctrine established by *M'Culloch* v. *Maryland,* 4 Wheat. 316 (1819), and its extensive progeny. *See, e.g., First Agricultural Nat'l Bank* v. *State Tax Comm'n,* 392 U.S. 339, 340 (1968). That doctrine has never been thought to limit Congress' power to authorize or prohibit such state taxation as it sees fit. *Baltimore Nat'l Bank* v. *State Tax Comm'n,* 297 U.S. 209, 211-212 (1936); *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U.S. 95, 102-103 (1941). "Immunity" exists only when Congress is silent; once Congress has spoken, the question is no longer one of "constitutional immunity" but

of statutory construction: state taxation is permissible provided that it is within the scope of the congressional authorization. That is the unmistakable teaching of this Court's decisions. *See, e.g., First Agricultural Nat'l Bank, supra,* 392 U.S. at 341; *Bank of California* v. *Richardson,* 248 U.S. 476, 483 (1919); *Owensboro Nat'l Bank* v. *Owensboro,* 173 U.S. 664, 668 (1899). In the case of the Edge Act, the enactment of Section 627 mooted any question of "constitutional immunity." Thus the supposed contingency that the Solicitor General seeks to attach to Section 627 is, and has always been, non-existent.

3. The legislative history contains nothing at all to support the Solicitor General's theory, and he scarcely pretends otherwise. No member of the 1919 Congress intimated the slightest doubt about the power of Congress to authorize state taxation of Edge Banks. It is true, as the Solicitor General points out (S.G. Br. 9-10), that a few Senators expressed uncertainty whether the states would be entitled to tax Edge Banks *in the absence of* congressional authorization, but those doubts were promptly resolved by adding a provision—repeatedly changed as the legislation proceeded through Congress—expressly authorizing specified forms of state taxation. No one questioned the validity of such a provision, and no one suggested that it was to be contingent on some later judicial decision regarding "constitutional immunity." By the very act of legislating on the subject of state taxation, Congress pre-empted the immunity issue, and there is no evidence that anyone thought otherwise. Thus the legislative history provides no more support for the Solicitor General's contingency theory than does the unequivocal statutory language itself.[1]

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[1] The Solicitor General's assumption that Congress believed the "constitutional immunity" doctrine might somehow preclude state taxation specifically authorized by Congress, even if correct (and it is not), does not explain why Congress would enact legislation that did not express its true purpose.

II.

Without justification, the Solicitor General has disregarded authoritative evidence that Congress intended Section 627 to provide the exclusive rule governing state taxation.

1. It can hardly be doubted that, as members of the House Banking and Currency Committee, the authors of Section 627 were well aware of the long-standing rule, reaffirmed by this Court only a few months earlier in *Bank of California* v. *Richardson*, 248 U.S. 476, 483 (1919), that federal legislation permitting specified state taxation of national banks constituted the "exclusive rule" governing such taxation. *See Owensboro Nat'l Bank* v. *Owensboro*, 173 U.S. 664, 668 (1899). A Congress that wanted to be "doubly sure" that its intentions regarding state taxation of Edge Banks were made clear (S.G. Br. 10, 17) would surely have taken care to frame the authorizing legislation in light of this Court's construction of comparable legislation. The Solicitor General disregards persuasive evidence that it in fact did so (J.S. 15-16).

The intended meaning of Section 627 was given a virtually definitive explanation by Representative Wingo of the House Banking and Currency Committee, which drafted Section 627 to replace a materially different provision in the Senate bill. Representative Wingo said on the floor of the House that "we are going to make these corporations [Edge Banks] and their stock to be taxed exactly in the same manner as national banks and their stocks are taxed" (58 Cong. Rec. 8108 (1919)).[2] He explained the reason

[2] The operative language of Section 627 ("shall be subject to tax by the State within which its home office is located") closely parallels language in the equivalent section of the National Bank Act, R.S. § 5219 (authorizing certain "taxes imposed by authority of the State within which the association is located").

for doing so: "The Supreme Court of the United States and the different courts have interpreted this language. . . . We thought that would save a great deal of controversy" (*ibid.*).

The Solicitor General brushes aside Representative Wingo's statement with the unsubstantiated assertion that it was "probably directed" only to the taxation of Edge Bank *shares* (S.G. Br. 12, n.6). Representative Wingo's own words, however, leave no room for doubt that he was referring not only to Edge Bank shares but to Edge Banks themselves. His statement constitutes powerful evidence that the authors of Section 627 drew a close parallel between the taxation of Edge Banks and the taxation of national banks under statutes that this Court had repeatedly and recently construed. The Solicitor General offers no acceptable reason for not taking Representative Wingo's explanation as authoritative and, indeed, controlling.

2. The Solicitor General instead offers the slippery argument that the Senate's ultimate acceptance of the House substitute (after deletion of a *proviso* relating to taxation of bank shares) means that "the House amendment was not perceived to alter the basic effect of the Senate version" (S.G. Br. 17), and on that dubious premise he claims that the meaning of the House version can be ascertained from certain imprecise remarks made during the Senate floor debate weeks before the House version was even drafted (*ibid.*). Both parts of the argument are in error. First, the Senate's acceptance of the House version does not signify that anyone perceived the "basic effect" of the House and Senate versions to be similar, and clearly they were not—although *neither* version authorized general, unlimited taxation of Edge Banks.[3] Second, it is clear from the context

[3] The bill passed by the Senate authorized the states to tax Edge Banks "the same as member banks of the Federal Reserve System" (58 Cong. Rec. 4969 (1919)). At the time, national banks could

(footnote continued on following page)

that the senatorial comments the Solicitor General relies on (S.G. Br. 17) were addressed solely to whether there was need for any provision at all governing state taxation, not to the particular contents of such a provision.

Thus, the legislative history not only fails to support the Solicitor General's contention, but refutes it.

III.

The FRB's authority to authorize Edge Bank branches is an issue on this appeal because the Court below erroneously held that such authority is lacking.

The Solicitor General notwithstanding (S.G. Br. 18, n.9), the issue whether the Board of Governors of the Federal Reserve System ("FRB" or "Board") is empowered to authorize Edge Bank branches is properly before this Court. The issue is here because the Court below held that Section 615(b) of the Act, which permits branches and agencies abroad with Board approval, impliedly prohibits branches in the United States. That holding was the predicate for the Court's decision that Section 627 does not preclude taxation outside the home-office state. The Court reasoned that in enacting Section 627 Congress could not have intended to confer "immunity" on Edge Bank branches because such branches were unauthorized and therefore "non-

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(footnote continued from preceding page)

not be taxed at all except on their real estate. R.S. § 5219; *Owensboro Nat'l Bank* v. *Owensboro,* 173 U.S. 664, 668 (1899); *Bank of California* v. *Richardson,* 248 U.S. 476, 483 (1919). State-chartered banks, which were also members of the Federal Reserve System, were generally taxed like national banks because of obvious competitive considerations. Senate Comm. on Banking, Housing and Urban Affairs, 92nd Cong., 2d Sess., *Report on State and Local Taxation of Banks,* pp. 380-381 (Comm. Print 1972). The Solicitor General's assertion that state-chartered banks were "fully taxed" (S.G. Br. 11, n.4) is incorrect.

existent" (J.S. at A5). To buttress that conclusion, the Court asserted—incorrectly (*see* J.S. at 13 n.9)—that in 1920 the Board itself so construed Section 615(b)when it barred domestic branches in the original version of Regulation K (J.S. at A2-A3).

Because Section 615(b) has been part of the Edge Act since 1919, and because there has been no subsequent legislation authorizing domestic branches, it is evident that if Section 615(b) prohibited domestic branches in 1919, it still does so today. If the lower Court's reading of Section 615(b) is correct, therefore, the FRB's current regulations permitting such branches are invalid.

The Solicitor General appears to give some credence to the lower Court's holding by claiming that Section 615(b) "plainly *could* have been read as prohibiting, by negative implication, the operation of agencies or branches in the United States" (S.G. Br. 13 (emphasis supplied)).[4] But without analyzing the opinion below or offering any other explanation for his assertion, he simply denies that the Court of Appeals so held (S.G. Br. 18, n.9), and he then proceeds to offer his own view—which he does not claim the lower Court shared—that the FRB's power to authorize domestic branches derives from the International Banking Act of 1978, P.L. 95-369, 92 Stat. 607 (*ibid.*). This view will not bear scrutiny. The 1978 legislation neither authorized domestic branches nor amended Section 615(b); it *did*, however, expressly prohibit the FRB from modifying any restrictions, conditions or limitations that the Edge Act requires. P.L. 95-369, § 3(a), 92 Stat. 608 (1978). Therefore, if Section 615(b) does prohibit domestic branches, as the Court below held, there can be no escape from the con-

[4] The Solicitor General nevertheless concludes, though grudgingly, that the 1919 Congress expected Edge Banks to operate across state lines (S.G. Br. 13-16), and he acknowledges that this conclusion "strengthen[s]" our reading of Section 627 (*id.* at 13).

clusion that the FRB's 1979 regulations, to the extent that they purport to permit such branches, are invalid.[5]

IV.

The home-office state, having the exclusive power of taxation, is entitled to tax the entire income of an Edge Bank, including income attributable to operations elsewhere.

The Solicitor General contends that if the power to tax Edge Banks is limited to the home-office state, that state "might" not be able to tax income attributable to other states because of due-process limitations, with the result that some income may escape taxation altogether (S.G. Br. 19, n.10). He cites no pertinent authority in support of this contention, and he ignores contrary authority that is not only pertinent but very likely controlling.

This Court has long held that the states can tax their own domiciliaries on income earned in other states. *Law-*

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[5] The FRB's authority to allow domestic branching notwithstanding Section 615(b) can hardly be doubted. The Edge Act gives the Board broad powers to prescribe rules and regulations governing virtually every aspect of Edge Banks' affairs. *See, e.g.*, § 615(a). Section 615(b) clearly does not prohibit domestic branches *expressly*; as the Solicitor General recognizes (S.B. Br. 13), any such prohibition would have to be by "negative implication." The FRB, which originally drafted Section 615(b) (J.S. 13, n.10), has never drawn such a "negative implication," for it authorized domestic agencies as early as March 1920, only three months after the statute's enactment, and as the Solicitor General acknowledges (S.G. Br. 16), Section 615(b) "treats branches and agencies alike." Thus the FRB's long-standing administrative construction of Section 615(b) is dispositive. "[W]here a statute is 'silent or ambiguous' with respect to a specific issue, a court should defer to the construction adopted by the agency administering the statute whenever the agency has adopted a 'permissible construction of the statute.' " *Independent Ins. Agents of America, Inc.* v. *Board of Governors of the Federal Reserve System*, 838 F.2d 627, 632 (2d Cir. 1988), quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

rence v. *State Tax Comm'n*, 286 U.S. 276 (1932) (business income); *Guaranty Trust Co.* v. *Virginia*, 305 U.S. 19 (1938) (trust income). As the Court said in *Lawrence*, "domicile in itself establishes a basis for taxation." 286 U.S. at 279. Although *Lawrence* and *Guaranty Trust* involved individual rather than corporate taxpayers, it is doubtful that the due process clause confers greater rights on corporations than on natural persons.

At least two state courts have upheld the domiciliary state's right to tax out-of-state income that 15 U.S.C. § 381 shields from taxation elsewhere. *Coors Porcelain Co.* v. *State*, 517 P.2d 838 (Colo. 1973) (*en banc*), *cert. denied*, 419 U.S. 874 (1974); *Deseret Pharmaceutical Co.* v. *State Tax Comm'n*, 579 P.2d 1322 (Utah 1978). *Cf. Central R. Co.* v. *Pennsylvania*, 370 U.S. 607 (1962) (railroad cars having no tax situs elsewhere held subject to ad valorem tax by state of owner's domicile).

There appears to be no sound reason why Edge Banks should not be treated, for tax purposes, as domiciliaries of the states in which they have their home offices. Such treatment seems entirely consistent with the Edge Act's requirement that each Edge Bank have a designated "home office." *See* §§ 613, 622, 625, 627. The home-office state would thus have power to tax an Edge Bank's total income, including income earned outside the home-office state. Accordingly, Section 627 does not confer tax "immunity," nor does it cause any income to escape taxation.

Conclusion

By relying on novel theories markedly different from anything previously raised or considered in this or any other litigation, the Solicitor General has underscored the inappropriateness of summary disposition of this appeal. The decision below is in error, and this appeal presents federal questions that are both substantial and of public importance. Appellee's motion to dismiss or affirm should be denied.

Respectfully submitted,

EDWARD W. KEANE
Counsel for Appellant
125 Broad Street
New York, New York 10004
(212) 558-4000

WILLARD B. TAYLOR
H. RODGIN COHEN
THEODORE EDELMAN

SULLIVAN & CROMWELL
New York, New York

Of Counsel

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